

4-20-2010

# Idaho Power Co. v. Dept. of Water Resources Clerk's Record v. 2 Dckt. 37348

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LAW CLERK

Vol. 2 of

IN THE  
SUPREME COURT  
OF THE  
STATE OF IDAHO

IN THE MATTER OF LICENSED WATER  
RIGHT NO. 03-0718 IN THE NAME OF  
IDAHO POWER COMPANY,

IDAHO POWER COMPANY,

Petitioner/Respondent,

-vs-

THE IDAHO DEPARTMENT OF WATER RESOURCES,

Respondent/Appellant.

Appealed from the District Court of the Third Judicial District  
of the State of Idaho, in and for Washington County

Honorable Susan E. Wiebe

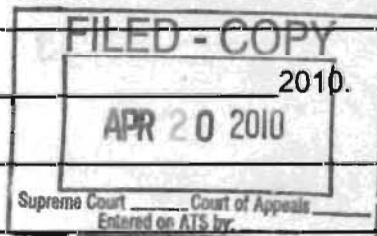
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Filed this \_\_\_\_\_ day of \_\_\_\_\_



Clerk

By:

Deputy

37348

IN THE SUPREME COURT OF THE STATE OF IDAHO

\* \* \* \* \*

IN THE MATTER OF LICENSED WATER	)	
RIGHT NO. 03-0718 IN THE NAME OF	)	
IDAHO POWER COMPANY,	)	Volume II
-----	)	
IDAHO POWER COMPANY,	)	
	)	
Petitioner/Respondent,	)	
	)	SUPREME COURT NO. 37348-2010
-vs-	)	
	)	
THE IDAHO DEPARTMENT OF	)	RECORD ON APPEAL
WATER RESOURCES,	)	
	)	
Respondent/Appellant.	)	

\* \* \* \* \*

Appeal from the District Court of the Third Judicial District of  
the State of Idaho, in and for the County of Washington.

\* \* \* \* \*

Honorable Susan E. Wiebe

\* \* \* \* \*

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RECORD ON APPEAL

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF WASHINGTON

IN THE MATTER OF LICENSED WATER  
RIGHT NO. 3-7018 IN THE NAME OF IDAHO  
POWER COMPANY

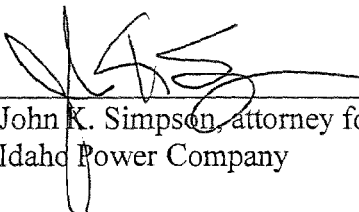
State of Idaho            )  
                                  )       ss.  
County of Ada            )

I, JOHN K. SIMPSON, being first duly sworn upon oath, deposes and says:

1. I am one of the attorneys in the firm Barker Rosholt & Simpson LLP providing legal representation to Petitioner Idaho Power Company in the above captioned matter. I am over the age of 18 and have knowledge of the files pertinent to this matter, and I make this affidavit based upon personal knowledge.
2. Attached herewith as Exhibit 1, please find a true and correct copy of the *Memorandum Decision in Riley v. Rowan*, Case No. 39576, Subcase No. 94-00012 (1997), and also *Riley v. Rowan*, 131 Idaho 831, 965 P.2d 191 (1998), affirming the same.
3. Attached herewith as Exhibit 2, please find a true and correct copy of pertinent documents retrieved from the Department's file, concerning Water Right License 65-12096, issued in the name of Idaho Power Company at Cascade Reservoir.
4. Attached herewith as Exhibit 3, please find a true and correct copy of the Department's "RECOMMENDED WATER RIGHTS ACQUIRED UNDER STATE LAW" for subcase 03-07018 filed by the Department in the Snake River Basin Adjudication.

Dated this 8<sup>th</sup> day of September, 2009.

BARKER ROSHOLT & SIMPSON LLP

  
\_\_\_\_\_  
John K. Simpson, attorney for Petitioner  
Idaho Power Company

SUBSCRIBED AND SWORN to before me this 8<sup>th</sup> day of September, 2009.



*Suzanne Estes*

Notary Public for Idaho.

Residing at: *Boise Idaho*

Commission Expires: *June 1, 2012*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 8<sup>th</sup> day of September, 2009, I served a true and correct copy of the foregoing **AFFIDAVIT OF JOHN K. SIMPSON** by delivering it to the following individuals by the method indicated below, addressed as stated.

Filed with the Court via Facsimile and US Mail, postage prepaid.

**VIA PERSONAL DELIVER**

Garrick Baxter

Idaho Department of Water Resources

322 East Front Street

P.O. Box 83720

Boise, ID 83720-0098

*[Signature]*

John K. Simpson



EXHIBIT

1

000209

1997 AUG 28 PM 3:35

DISTRICT COURT-SRBA  
TWIN FALLS CO. IDAHO  
FILEDIN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re: SRBA

Case No. 94-00012

Case No. 39576

MEMORANDUM DECISION

NORMAN RILEY and ROBIN  
RILEY, husband and wife,

Plaintiffs,

v.

CATHERINE ROWAN,

Defendant.

## I. BACKGROUND

This action contesting ownership of a water right was filed in the Snake River Basin Adjudication (SRBA) by Norman and Robin Riley against Catherine Rowan. This follows the case of *Rowan v. Riley*, Madison County Case CV-93-350, in which the Honorable James C. Herndon, Presiding District Judge, held that he did not have subject matter jurisdiction to resolve the ownership of the water right at issue. The dispute is about a water right license issued in the names of two deceased people. The enabling permit for the license is Water Permit 22-07280. Trial was held followed by briefing by the parties. The following decision constitutes this court's findings of fact and conclusions of law.

## II. FINDINGS OF FACT

### A. THE PARTIES

Plaintiffs, Norman and Robin Riley, husband and wife, (the Rileys) own and farm land in Madison County. Robin Riley is the daughter of James "Jim" Howe. Jim Howe died on March 4, 1992. By agreement with her sisters, Robin Riley is entitled to any farming interest including water from her father's estate. The Rileys claim that Water Permit 22-07280 is a personal property farming interest of Jim Howe's estate which entitles them to ownership of the water license that followed from the permit.

Defendant, Catherine Rowan, is a Utah resident who owns real property in Madison County. Catherine Rowan leases her land to the Rileys for farming purposes. Catherine Rowan was the sister of Jim Howe and is Robin Riley's aunt.

### B. THE LAND

Catherine Rowan and Jim Howe owned a vested remainder in 756 acres of land (the Farm) deeded to them by the Webster-Soule Farm Corporation in 1944. This deed reserved a life estate in their mother, Lucille Howe (Lucille).

From 1969 to the date of Lucille's death in 1983, Jim Howe leased and farmed the land that constituted Lucille's life estate. Therefore, prior to Lucille's death, Jim Howe leased and farmed the land in which he and Catherine Rowan held a future interest. After Lucille's death, the Farm passed to Jim Howe and Catherine Rowan as tenants in common in fee simple absolute.

Between 1983 and 1988, Jim Howe continued to farm all of the land--his one half and Catherine Rowan's half under a lease. Facing bankruptcy in 1987 and 1988, Jim Howe sought loans to be secured by his ownership interest in the Farm. In 1988 Catherine Rowan desired to partition the Farm to avoid personal liability for Jim Howe's debt.

On March 31, 1988, cross deeds were executed dividing the Farm into two halves. Jim Howe was deeded the northern half with all appurtenances and Catherine Rowan was deeded the southern half with all appurtenances. (Exhibits J, K, M, N.)

The disputed water is drawn from a well located on the land deeded to Catherine Rowan. The water from the "south well" was primarily used to irrigate the south half of the Farm and, secondarily, to supplement the irrigation of the north half. The original cross deeds did not grant an interest in the water from the "south well" to Jim Howe for use on his land.

In order to service loans, Jim Howe's lender required him to secure a right to water from the "south well" located on Catherine Rowan's land, as well as an easement to maintain the delivery system to the north lands. Jim Howe sought and Catherine Rowan granted an easement (Corrected Agreement, August 3, 1988, Exhibit P) and a one-half interest in the water from the "south well" (Correction Grant Deed, August 11, 1988, Exhibit R). Jim Howe continued to farm his north land and Catherine Rowan's southern half under a lease.

On December 5, 1991, Jim Howe executed a Bill of Sale of Goods and Chattels (Bill of Sale) to the Rileys. The Bill of Sale lists "any and all water rights including . . . application approved permit #22-7280 which is the water right associated with the well on Catherine Rowan's southern portion of land." Six months after Jim Howe's death in March 1992, the Rileys filed the Bill of Sale in Madison County.

After Jim Howe's death, the Rileys farmed both halves of the original Farm pursuant to a lease with Catherine Rowan for her southern half. In 1995 the working relationship between Catherine Rowan and the Rileys deteriorated to the point that Catherine Rowan wanted to discontinue renting her land to the Rileys. The Rileys have continued to lease Catherine Rowan's land by court order issued in the original Madison County case.

#### C. THE WATER LICENSE FOR THE "SOUTH WELL"

On August 28, 1978, Jim Howe applied for a water permit from IDWR under the names of "Lucille W. Howe AND/OR Jim Howe." From what would be called the "south well," IDWR granted the Water Permit 22-07280 allowing the appropriation 10.81 cfs of ground water from the "south well." The permit application also stated that Lucille Howe owned the property that was to be the place of use. Question 9(c) of the permit application states: "If the property is owned by a person other than the applicant, describe the arrangement enabling the applicant to make this filing." Question 9(c) was not completed by either Jim Howe or Lucille Howe reflecting that Jim and Lucille filed as owners of the land. The permit also required proof of construction of work and application of water to beneficial use to be submitted on or before August 1, 1983.

The well was constructed and Jim Howe timely filed a notice of completed development for Water Permit 22-07280 on February 7, 1983, with IDWR.

On August 23, 1989, IDWR issued a Beneficial Use Field Report for Water Permit 22-07280 listing the owner as "Lucille W. Howe or Jim Howe." The Beneficial Use Field

Report (August 23, 1989, Exhibit 5) confirmed that the conditions specified by the permit six years earlier had been completed.

On August 14, 1988, a Notice of Claim to a Water Right for the "south well," Water Permit 22-07280, was filed in the SRBA in the name of "Lucille W. Howe - Deceased, Jim W. Howe and/or Catherine Rowan."

On November 12, 1992, Robin Riley filed with IDWR a New Property Owner Notice of Change of Water Right Ownership (Notice of Change) listing the Rileys as claimants. The Notice of Change form asked if the change in ownership resulted in a splitting of the water right and the "yes" box was checked, listing Water Permit 22-07280 as having been split.

On November 24, 1992, IDWR sent a letter to Norman Riley indicating that Water Permit 22-07280 had been split into 22-07280A and 22-07280B. On December 2, 1992, IDWR issued Notices of Claim to a Water Right to both the Rileys (Notice of Claim 22-07280B) and to Catherine Rowan (Notice of Claim 22-07280A). The division of the original 10.81 cfs was 4.270 cfs to the Rileys and 6.540 cfs to Catherine Rowan.

On December 4, 1995, IDWR issued Water Right License 22-07280 in the name of Jim Howe and Lucille Howe, both deceased. In a December 6, 1995, letter to the Rileys and Catherine Rowan, IDWR informed them of their right to request a hearing to review the terms and conditions for Water Right License 22-07280 before IDWR pursuant to Idaho Code § 42-1701 A(3). Both parties filed petitions requesting a hearing.

The matter was heard on March 19, 1996, before an IDWR hearing officer. The officer concluded that a revocation of the license was not appropriate at that time. The officer believed that the ownership dispute did not undermine the authority of IDWR to issue the license under Idaho Code § 42-219, despite the fact that IDWR named two deceased persons as owners of the license.

The Rileys filed this *Complaint for Declaratory Judgment Regarding Ownership of Water Rights* in the SRBA.

### III. DECLARATORY JUDGMENT STANDARDS

None of the parties have disputed the propriety of determining the issue of ownership of the water right under Idaho's declaratory judgment statute, Idaho Code § 10-1201, *et seq.* See

also, I.R.C.P. 57. The standard for determining justiciability in a declaratory judgment setting has been set by the United States Supreme Court:

The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. . . . It must be a real and substantial controversy admitting a specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

*Aeta Life Insurance Company v. Haworth*, 300 U.S. 227, 240-41 (1937).

This standard has been adopted by the Idaho Supreme Court, which held that "a declaratory judgment must clarify and settle the legal relations and issues, and afford relief from the uncertainty and controversy which gave rise to the action." *Harris v. Cassia County*, 106 Idaho 513, 516, 681 P.2d 988, 991 (1984). See also, *State v. Rhoades*, 119 Idaho 594, 809 P.2d 455 (1991); *Sweeney v. American National Bank*, 62 Idaho 544, 115 P.2d 109 (1941). Based upon the facts presented at trial, the standard for declaratory judgment has been met. It is found that the SRBA court has jurisdiction over the parties and the subject matter of this declaratory judgment action.

#### IV. THE LEGAL RELATIONSHIPS AND DUTIES BETWEEN PARTIES

A determination of ownership of the water right requires a clear delineation of the property interests, legal relationships, and duties between the parties.

##### A. JIM HOWE 'S AND CATHERINE ROWAN'S PROPERTY INTERESTS IN THE FARM

The first inquiry is to determine Jim Howe's and Catherine Rowan's interests in the Farm when the initial application for the disputed water permit was filed on August 28, 1978. The 1944 deed sets forth Catherine Rowan's and Jim Howe's interests:

[R]emainder over in fee to her children, share and share alike, without restriction, the lands hereinafter describes. Provided, however, that if any of the children of the said Lucille Webster Howe die without issue, then their pro rata share shall pass to their surviving brothers and sisters, share and share alike, in fee. If any of them die leaving issue, then their issue shall share by right of representation in fee.

(Exhibit B.)

The deed reserved a life estate in Lucille Howe. Lucille's children were deeded the Farm in fee simple, contingent upon their dying with issue. Therefore, under the terms of the deed, Jim

Howe and Catherine Rowan possessed a contingent remainder in the Farm at the time Jim filed the water permit application.

Idaho Code §55-111 entitled Suspension of Power of Alienation states:

The absolute power of alienation of real property cannot be suspended by any limitation or condition whatever, for a longer period than during the continuance of the lives of the persons in being at the creation of the limitation or condition, and 25 years thereafter . . . ; no trust heretofore or hereafter created, either testamentary or inter vivos, shall be declared void, but shall be so construed as to eliminate parts violating the above provisions, and in such a way that the testators or trustors wishes are carried out to the greatest extent permitted by this act.

Here, the deed expressly states that the extent of Lucille's children's interest in the Farm is contingent upon whether or not the child dies with issue. This condition is subject to the limitations provided for by Idaho Code § 55-111. If the contingency provided for by the grantor could exist beyond the statutory period provided by Idaho Code § 55-111, the contingency must be struck.

Any valid limitation or condition within a gift must occur or fail within 25 years of a life in being at the time of creation of the restriction. Idaho Code § 55-111. The gift from the grantor to the "children of Lucille Howe" is a class gift. A class gift is a gift of "aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, who are all to take in equal or some other definite proportions; share of each being dependant for its ultimate amount upon the ultimate number." *Hepburn v. Winthrop*, 83 F.2d 566, 570, 65 App. D.C. 309 (1936). At the time of the creation of the deed, the ultimate number of Lucille's children with issue was indeterminable. Because there may have been unborn members of the class at the time of creation, the unborn member of the class cannot be considered a life in being for the purposes of Idaho Code § 55-111. At common law, a gift to a single class member in violation of the rule against perpetuities voided the gift for the entire class. *See for example, Betchard v. Iverson*, 212 P.2d 783, 786, 35 Wash. 2d 344 (1949). Because no member of the class of Lucille's children can be used as a measuring life, the only measuring life named within the gift is that of Lucille Howe.

Idaho Code § 55-111 states that the absolute power of alienation cannot be suspended by any limitation or condition for a period longer than the duration of the lives of persons in being

at the time of the creation of the condition and 25 years thereafter. Since, Lucille Howe is necessarily the measuring life, the contingency stated in the deed must be definitively settled within 25 years after Lucille Howe's death to be valid. The gift's contingency that Lucille's children must die with issue in order to take would not necessarily vest within 25 years of Lucille's death. The contingency in the gift is in violation of Idaho Code § 55-111.

Idaho Code § 55-111 provides that "no trust heretofore or hereafter created, whether testamentary or inter vivos, shall be declared void, but shall be so construed as to eliminate parts violating the above provision, and in such a way that the [testators] wishes are carried out to the greatest extent permitted by this act." Therefore, the contingency contained in the deed is severable from the gift. Severing the contingency from the deed results in Catherine Rowan and Jim Howe owning a fully vested and indefeasible future interest in Lucille Howe's life estate at the time Jim Howe applied for Water Permit 22-07280.

**B. THE LEGAL RELATIONSHIP BETWEEN CATHERINE ROWAN AND JIM HOWE  
CREATED BY THE SHARED INTEREST IN THE FARM**

During Lucille's lifetime, legal duties existed between Jim Howe and Catherine Rowan based on their co-ownership of the vested remainder interest in the Farm.

Idaho Code § 55-104 states that "[e]very interest created in favor of several persons in their own right is an interest in common, unless acquired by them in partnership, joint interest, or as community property." In Idaho there is a rebuttable presumption favoring tenants in common, with no right of survivorship. *Powell v. Powell*, 22 Idaho 531 (1912). The record contains no evidence that the interest in the Farm was anything other than a tenancy in common.

Tenants in common are entitled to the use, benefit, and possession of the common property, provided they do not exclude their cotenant from a like use, occupancy, and benefit. *Washington County Irrigation Dist. v. Talboy*, 55 Idaho 391 (1935). The same duty exists between co-remaindermen prior to a present possessory interest. *Givens v. Givens*, 387 S.W.2d 851 (1965); *Clark v. Lindsey*, 25 N.E. 422 (1890). Succinctly stated, the principle is:

Where there are two remaindermen, they, in their relations with each other concerning their respective interests in the property given to them together, may to a certain extent, be governed by the principles of law which govern the rights duties, and liabilities of cotenants generally. For example, where a life estate and remainders in two or more persons have been created in real estate, and the life



tenant is still living, the coremaindermen have fiduciary relationship to each other such that no one of them may impair the rights or interests of his coremaindermen. If one them acquires an outstanding title, he acquires it for all, subject to the duty of others to contribute to the cost of acquiring the title if they wish to take advantage of it.

51 Am. Jur. 2d § 1 (1970) (emphasis added).

Therefore, a fiduciary duty existed between Jim Howe and Catherine Rowan as tenants in common owning a vested remainder interest in the Farm.

**C. CATHERINE ROWAN OWNED AN INTEREST IN THE WATER PERMIT AND THE LICENSE**

When Jim Howe filed the application for a water permit in August 1978, he owed a fiduciary duty to Catherine Rowan to protect her ownership interest in the Farm. Any action taken by Jim Howe to exclude Catherine Rowan as a co-owner of the permit would violate that fiduciary duty.

Plaintiffs attach great importance to the fact that Jim Howe was a lessor of the Farm when he applied for the water permit. *Plaintiff's Post Trial Brief* at 19. They correctly argue that "water may be appropriated for beneficial use on land not owned by the appropriator, and this water right becomes the property of the appropriator." *Plaintiff's Pretrial Brief* at 6. The law shields non-owners of land (lessors) after the lessor completes development of a proposed water right. In such instances, Idaho Code § 42-211 establishes the procedure by which anyone who has filed a permit application may change the place of use.

Whenever a permit has been issued pursuant to the provisions of this act, and the permit holder desires to change the place . . . of intended use or make other substantial changes in the method of diversion or proposed use or uses of water, he shall file an application for amendment upon forms to be furnished by the department of water resources to examine same and if approval thereof would not result in the diversion and use of more water than originally permitted and the rights of others will not be adversely affected thereby, the director of the department of water resources shall approve said application. . . .

*Id.* (Emphasis added.)

In August 1978, Jim Howe leased the Farm from Lucille; however, he was also the owner of a vested future interest in the Farm along with Catherine Rowan. He, therefore, held two simultaneous interests in the Farm: a leasehold and a vested future interest in common with

Catherine Rowan.

Idaho water law, as the Plaintiffs have argued, protects a lessor permittee by granting them the shield of a personal property interest in a water permit. See, e.g., *Marshall v. Niagara Springs Orchard Co. Ltd.*, 22 Idaho 144, 125 P. 208 (1912); *Basinger v. Taylor*, 30 Idaho 289, 164 P. 522 (1917); *Big Wood Canal Co. v. Chapman*, 45 Idaho 380, 263 P. 45 (1927); *Hardy v. Higginson*, 123 Idaho 45, 849 P.2d 946 (1993). The law does not allow an owner permittee who leases from his cotenants to use this protection as a sword to divest the cotenants of their water right. To allow Jim Howe to use his leasehold to overcome Catherine Rowan's vested remainder, which she held in common with him, would violate two legal principles. First, it would allow Jim Howe to benefit from the lease, ignoring his ownership interest, by using Idaho water law as a sword against Catherine Rowan. Secondly, it would allow him to breach the fiduciary duty of due care, loyalty, and prudence owed to his vested remainder cotenant, Catherine Rowan. The law does not allow these results.

Further, the facts of the case do not support the result favored by the Plaintiffs. Jim Howe expressly acknowledged that the permit application was intended to benefit the complete set of farm owners, not just himself. When he filed the application in his and Lucille's names, he did not intend to disavow Catherine Rowan's ownership interest nor did he breach his fiduciary duty to her. The application form, Question 9(c), asked: "If the property is owned by a person other than the applicant, describe the arrangement enabling the applicant to make this filing." Exhibit D. This was left blank indicating that no "arrangement," lease or otherwise, was the basis of Jim Howe's filing. He filed as a co-owner, not as a lessee.

Most significantly, following partition with Catherine Rowan, Jim Howe was required by his lenders to secure an interest in the "south well." Jim Howe and Catherine Rowan entered in the Correction Grant Deed (Exhibit R) reflecting Jim Howe's clear, unambiguous agreement and understanding that the permitted interest in the "south well" was shared with Catherine Rowan. That shared interest, as reflected in the Correction Grant Deed, served as the basis of Jim Howe's securing financing and is consistent with his fiduciary duty to Catherine Rowan.

The evidence in this case demonstrates that the Rileys knew their interest in the permit was shared with Catherine Rowan. Even after having recorded the Bill of Sale from Jim Howe which purported to convey the permit, Robin Riley filed a New Property Owner Notice of Change of

Water Right Ownership with IDWR. (Exhibit 2.) Where the form asks if the change in ownership results in a splitting of the right (into two or more rights), it is marked "yes." Robin Riley was correct in her statement to IDWR. Her position in this action has since changed.

The actions of Jim Howe, his application for the permit, his use of the permitted right to provide water for the Farm, his agreement to partition the Farm with Catherine Rowan, and his later acquisition of a one-half interest in Catherine Rowan's "south well," all reflect that Jim Howe understood and intended that he took an interest in the permit as an co-owner of land with Catherine Rowan, not as a lessor of the land. Any action otherwise would have breached his fiduciary duty to his sister. The only interest Jim Howe had in the permit was as an owner and was identical to that of Catherine Rowan. At Lucille's death, Jim Howe and Catherine Rowan became co-owners of the permit. To rule otherwise would allow Jim Howe, a co-owner, to strip water from his cotenant's Catherine Rowan, one-half of the Farm. Idaho Water law does not permit such a result.

#### V. WATER PERMIT 22-07280 BECAME A LICENSE BY OPERATION OF LAW DUE TO IDWR'S FAILURE TO MEET ITS STATUTORY DUTY

The failure of IDWR to perform its statutory duty to issue the license in a reasonable time requires the finding that Water Permit 22-07280 became a license by operation of law.

Following is a chronology of IDWR's action on Water Permit 22-07280:

August 28, 1978	Application for Permit filed in the names of Lucille W. Howe and/or Jim W. Howe (Exhibit D). Permit approved by IDWR.
February 7, 1983	Proof of Beneficial Use submitted to IDWR in the name of Jim Howe (Exhibit I).
August 23, 1989	IDWR Beneficial Use Field Report prepared (Exhibit 5).
December 4, 1995	Water License 22-07280 issued to Jim W. Howe and Lucille W. Howe, both deceased (Exhibit KK).

The record establishes that Jim Howe timely filed proof of beneficial use under Water Permit 22-07280 on February 7, 1983. IDWR then had a statutory duty to examine various aspects of the submission. I.C. § 42-217. The legislatively mandated examination was not issued until August 23, 1989 (IDWR Beneficial Use Field Report - Exhibit 5); over six years after Howe's submission.

IDWR has a duty to timely issue licenses following proper application, permitting, proof of beneficial use, and department examination.

Upon receipt by the department of water resources of all the evidence in relation to such final proof, it shall be the duty of the department to carefully examine the same, and if the department is satisfied that the law has been fully complied with and that the water is being used at the place claimed and for the purpose for which it was originally intended, the department shall issue to such user or users a license confirming such use.

I.C. § 42-219(1) (emphasis added).

In this case, IDWR issued the license on December 4, 1995; 12 years and 10 months after the submission of proof of beneficial use and 6 years and 4 four months after IDWR completed its tardy Beneficial Use Field Report. Where the legislature has placed the duty on IDWR to examine and issue licenses, a delay of 12 years and 10 months constitutes a breach of that duty.

IDWR's breach of duty in issuing the license for this right caused the right to remain in a state of legal limbo. By holding the right in the permitting process, IDWR denied it the statutory recognition and benefits conveyed to licensed rights under Idaho Code § 42-220. IDWR's failure to timely exercise its duty left the permitted water right as a personal property interest, thereby denying it the real property right status to which it was legally entitled. Had IDWR met its duty, the ownership dispute may never have ripened because a license would have issued and become appurtenant to the land. This dispute has spawned lawsuits in Madison County and the SRBA and an administrative proceeding before IDWR. Had IDWR fulfilled its statutory obligation, none of these actions, with their substantial expense, would likely have been filed.

IDWR's breach of its duty to issue licenses in a timely manner takes on constitutional dimensions as well. The Idaho Constitution holds inviolate the right to appropriate water. IDAHO CONST. art. 15 § 3. The lengthy delay in issuing this license denied the water users their constitutional right to appropriate water. By leaving the right in the vulnerable permit status, it is not accorded the statutory recognition of a fully protected water right, as it would be when licensed.

The record in this case reflects that significant delays in issuing licenses is IDWR's usual practice statewide. This inattention to a legislatively mandated duty requires the court to rule that Water Permit 22-07280 is deemed to have become a license on February 7, 1983, the date Jim

Howe submitted proof of beneficial use. IDWR's examination and report issued six years later found the use was lawfully established and the license, issued 12 years and 10 months later, issued on the exact terms of the permit. Therefore, where a license issued is consistent with the terms of the permit application, the permit, and IDWR's examination and where IDWR has breached its duty to timely license the water right, this court deems the license to be effective and in force as of the date proof of beneficial use was submitted.

The effect of this ruling is that the right in dispute became a licensed real property right as of February 7, 1983. At Lucille Howe's death in October 1983, the owners of Water License 22-07280 became James Howe and Catherine Rowan. Therefore, after February 7, 1983, no permit existed as a personal property interest in water belonging to James Howe which could have been sold or bequeathed to the Rileys.

The license, effective February 7, 1983, was a real property interest which was part of the land. Its ownership was transferred by the various deeds between Jim Howe and Catherine Rowan. The current status of the license is governed by the Correction Grant Deed (Exhibit R) conveying a one-half interest in the water from the "south well" to Jim Howe, which has passed to the Rileys.

## VI. CONCLUSION

Catherine Rowan owns a licensed (License 22-07280) one-half interest in the "south well."  
The Rileys own a licensed (License 22-07280) one-half interest in the "south well."

The gift by deed, reserving a life estate in Lucille W Howe, created a co-tenency between Jim Howe and Catherine Rowan as vested remaindermen. Jim Howe's application for a water permit (22-07280) established in Catherine Rowan an interest in the permitted water. Jim Howe did not breach his fiduciary duty to her by taking action against his cotenant sister to strip her of her rightful interest. Catherine Rowan held the same ownership interest in Water Permit 22-07280 as Jim Howe.

It is also held that Water Permit 22-07280 became a license by operation of law on February 7, 1983. IDWR's failure to carry out its legislatively mandated duty to examine and license water rights following submission of proof of beneficial use requires this result. Therefore, the license became effective prior to Lucille Howe's death. When Lucille died in

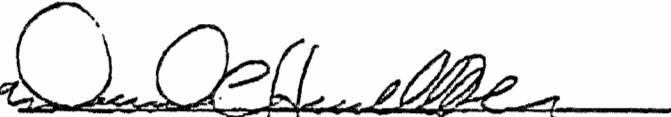
October 1983, the property and Water License 22-07280 vested in Jim Howe and Catherine Rowan as cotenants. The license followed the conveyances between Jim Howe and Catherine Rowan resulting in a one-half ownership interest now in Catherine Rowan and the Rileys.

### VII. ORDER

Based on this decision, **IT IS ORDERED** that the Idaho Department of Water Resources examine Water License 22-07280 and issue separate licenses to Catherine Rowan and Norman and Robin Riley, husband and wife, consistent with the Correction Grant Deed (Exhibit R) and its examination. These licenses shall issue and be filed with this court on or before October 1, 1997.

**IT IS SO ORDERED.**

DATED August 28, 1997.

  
DANIEL C. HURLEUTT, JR.  
Presiding Judge  
Snake River Basin Adjudication

**CERTIFICATE OF MAILING**

I certify that a true and correct copy of the **MEMORANDUM DECISION** was mailed on August 28, 1997, with sufficient first-class postage to the following:

Steven R. Parry  
Anderson, Nelson & Hall  
PO Box 51630  
Idaho Falls, ID 83405-1630

Roger D. Ling  
Ling, Nielsen & Robinson  
PO Box 396  
Rupert, ID 83350

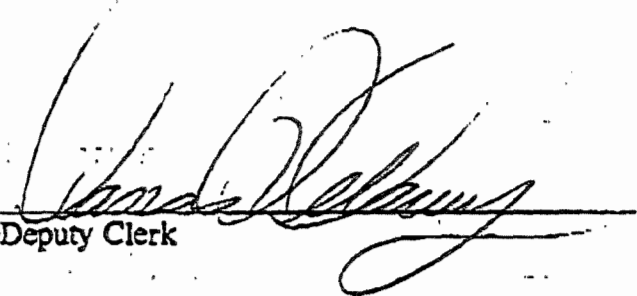
Gregory W. Moeller  
Rigby, Thatcher, Andrus, Rigby,  
Kam & Moeller  
PO Box 250  
Rexburg, ID 83440-0250

IDWR Document Depository  
PO Box 83720  
Boise, ID 83720-0098

Norm Young  
IDWR  
PO Box 83720  
Boise, ID 83720-0098

Courtesy copy to:

Hon. James C. Herndon  
District Judge, 7th Judicial District  
PO Box 717  
Blackfoot, ID 83221

  
Deputy Clerk

## IN THE SUPREME COURT OF THE STATE OF IDAHO

Docket No. 24153

IN RE SRBA CASE NO. 39576 SUB-CASE )  
 NO. 94-00012 COMPLAINT FOR )  
 DECLARATORY JUDGMENT RE )  
 OWNERSHIP OF WATER RIGHT. )

NORMAN RILEY and ROBIN RILEY, )  
 husband and wife, )

Plaintiffs-Appellants, )

v. )

CATHERINE ROWAN, )

Defendant-Respondent. )

Idaho Falls, May 1998 Term

1998 Opinion No. 96

Filed: August 19, 1998

Frederick C. Lyon, Clerk

Appeal from the District Court of the Fifth Judicial District, State of Idaho. Hon. Daniel C. Hurlbutt, District Judge.

District court decision awarding a one-half interest in water license to plaintiffs and a one-half interest to defendant, affirmed

Anderson, Nelson, Hall and Smith, Idaho Falls, for appellants. Steven R. Parry argued.

Rigby, Thatcher, Andrus, Rigby, Kam & Moeller, Chtd., Rexburg, for respondent. Gregory W. Moeller argued.

WALTERS, Justice

## NATURE OF THE CASE

This appeal raises a question of water law within the Snake River Basin Adjudication (SRBA). Norman and Robin Riley filed a declaratory judgment action against Catherine Rowan contesting the ownership of a water license issued in the names of two deceased people. After the SRBA district court held that each of the parties was entitled to a one-half interest in the water



license, the Rileys appealed. We affirm.

### I. FACTS AND PROCEDURAL BACKGROUND

In 1944, Lucille Howe was deeded a life estate in 756.5 acres of farm land in Madison County. The remainder interests in the farm land were given to her two children, James "Jim" Howe and Catherine Rowan. Thereafter, Jim Howe leased and farmed the land in which he and Rowan held future interests. In 1969, Jim Howe developed a well on the northern portion of the land, and subsequently acquired a water license from the Idaho Department of Water Resources (IDWR) in his name for the north land. The ownership of the water license for the north well is not in dispute.

In 1978, Jim Howe applied for a water permit from the IDWR, under the names of "Lucille W. Howe and/or Jim Howe," to develop a well on the southern portion of the land. The IDWR granted water permit No. 22-07280 for the appropriation of 10.81 cubic feet per second (c.f.s.) of ground water from the southern well. Thereafter, Jim Howe constructed the well and filed a notice of completed development with the IDWR, and he subsequently filed a notice of claim in the SRBA.

Lucille Howe died in 1983, and the farm land passed to Jim Howe and Rowan as tenants in common in fee simple absolute. In 1988, Jim Howe and Rowan agreed to partition the property. Jim Howe was deeded the northern half of the property with all appurtenances and Rowan was deeded the southern half of the property with all appurtenances. Jim Howe continued to farm his north land and Rowan's southern half under a lease agreement. Jim Howe and Rowan later entered into an agreement in which Jim Howe was granted a one-half interest in the water from the south well, as well as an easement to maintain delivery systems from the south well to his north land.

In 1991, Jim Howe sold all of his water rights, including any rights associated with the well on Rowan's southern portion of the land, to his daughter, Robin Riley, and her husband. The next year, Jim Howe died. After the settlement of Jim Howe's estate, the Rileys filed a notice of change of water right ownership with the IDWR, listing water permit No. 22-07280 as having been split. Consistent with the request, the IDWR split the water permit into 22-07280A and 22-07280B. The original permit for 10.81 c.f.s. was divided into 4.270 c.f.s. to the Rileys and 6.540 c.f.s. to Rowan.

On August 16, 1993, Rowan filed a declaratory judgment action against the Rileys, asking the court to determine the parties' rights and obligations as they related to the ownership of the south well, the responsibility for certain debt, and the ownership of water right No. 22-07280. The district

court determined that it did not have subject matter jurisdiction to hear any water law issues. The parties then sought a determination from the IDWR regarding the ownership of the permit and whether a license should be issued.

The IDWR granted the license and named as owners of the license, Lucille Howe and Jim Howe, both deceased. Subsequently, the Rileys filed a declaratory judgment action in the SRBA regarding the ownership of the water rights. In its memorandum decision, the SRBA district court awarded both Rowan and the Rileys a one-half interest in water license No. 22-07280. The Rileys appealed.

On appeal, the Rileys assert that the SRBA district court erred in holding that Rowan has an ownership interest in water right No. 22-07280. In particular, the Rileys contend that the SRBA district court erred in determining that (1) Jim Howe and Rowan held vested remainder interests prior to the death of their mother as a result of the 1944 deed; (2) Jim Howe owed a fiduciary duty to Rowan which prohibited him from acquiring a water permit in his own behalf; (3) the IDWR breached its statutory duty to issue a water license, which resulted in the water permit becoming a license on the date that proof of beneficial use was submitted; and (4) the bill of sale entered into between Jim Howe and the Rileys did not convey ownership of the water permit to the Rileys.

## II. DISCUSSION

### A. Standard of Review.

This Court must defer to findings of fact based upon substantial evidence, but will review freely the conclusions of law reached by stating legal rules or principles and applying them to the facts found. *Sun Valley Shamrock Resources, Inc. v. Travelers Leasing Corp.*, 118 Idaho 116, 118, 794 P.2d 1389, 1341 (1990). Accordingly, we exercise free review over the district court's conclusions of law. *Kawai Farms, Inc. v. Longstreet*, 121 Idaho 610, 613, 826 P.2d 1322, 1325 (1992).

### B. Whether the SRBA District Court Erred in Holding that Rowan has a One-Half Ownership Interest in Water License No. 22-07280.

The Rileys initially contend that the SRBA district court erred in determining that the 1944 deed violated the provisions of Idaho Code § 55-111, and by holding that the childrens' remainder interests were vested remainders. Instead, the Rileys assert that Jim Howe and Rowan held

contingent remainders until Lucille Howe's death. We agree and conclude that Jim Howe and Rowan held contingent remainders at the time the water permit was applied for and until the time when Lucille Howe died.

The granting language of the 1944 deed provides:

[F]or the term of her [Lucille Webster Howe's] natural life (that is to say, a life estate) and at her death remainder over in fee to her children, share and share alike, without restriction, the land hereinafter described. Provided, however, that if any of the children of the said Lucille Webster Howe die without issue, then their pro rata share shall pass to their surviving brothers and sisters, share and share alike, in fee. If any of them die leaving issue, then their issue shall share by the right of representation in fee.

The deed clearly only refers to Lucille Howe's interest as a life estate, and the remainder interests pass at Lucille Howe's death. Thus, it is at Lucille Howe's death that the remainder interests pass in fee, without restriction, and the identity of the remaindermen is determined. These remainder interests vest upon Lucille Howe's death. Thus I.C. § 55-111, which requires the remainder interest to vest or fail within twenty-five years of Lucille Howe's death, has been met. Consequently, until Lucille Howe's death the parties held contingent remainders, which were contingent upon each surviving Lucille Howe.

Having determined that Jim Howe and Rowan held contingent remainders at the time the water permit was applied for, the next question becomes whether Jim Howe acquired an interest in the water permit to the exclusion of Rowan. The district court held that the only interest Jim Howe had in the permit was identical to that of Rowan; thus at the time of Lucille Howe's death, Jim Howe and Rowan became co-owners of the permit. The evidence indicated that Jim Howe "acknowledged that the permit application was intended to benefit the complete set of farm owners, not just himself. When he filed the application in his and Lucille's names, he did not intend to disavow Catherine Rowan's ownership interest." Furthermore, both the application for the permit and the notice of claim were filed when Jim Howe was acting as manager of the farm and did not create a separate interest in the water permit to the exclusion of Rowan. The district court determined that following the parties' decision to partition the property, Jim Howe and Rowan entered into an agreement in which it was "Jim Howe's clear, unambiguous agreement and understanding that the permitted

interest in the 'south well' was shared with Catherine Rowan." We conclude that sufficient evidence supports the district court's decision that Jim Howe did not acquire an interest in the water permit prior to Lucille Howe's death.

Jim Howe's only interest in the water permit was the one-half interest he obtained following Lucille Howe's death and the partition of the property. The bill of sale Jim Howe entered into with the Rileys could transfer no more than Jim Howe owned. Accordingly, we conclude that after the water permit became water license No. 22-07280 the Rileys and Rowan were each entitled to a one-half interest.

With respect to whether Jim Howe owed a fiduciary duty to Rowan, we need not address this issue because Jim Howe never acquired an interest in the water permit to the exclusion of Rowan. Additionally, having determined that Jim Howe and Rowan were tenants in common, each owning a one-half interest in water license No. 22-07280, we decline to address whether the IDWR breached its statutory duty by delaying the issuance of the license. Regardless of when the IDWR issued the licence, Jim Howe and Rowan each owned a one-half interest prior to Jim Howe subsequently selling his interest to the Rileys.

### III. CONCLUSION

Although we conclude that the district court was incorrect in determining that Jim Howe and Rowan held vested remainders when the permit was applied for, we nevertheless affirm the district court's conclusion. Thus, for the above stated reasons, we affirm the SRBA district court's decision that each of the parties is entitled to a one-half interest in water license 22-07280. Costs on appeal to the respondent. No attorney fees are awarded on appeal.

Chief Justice TROUT and Justices JOHNSON, SILAK and SCHROEDER, CONCUR.

I, Frederick C. Lyon, Clerk of the Supreme Court  
of the State of Idaho, do hereby certify that the  
above is a true and correct copy of the *Opinion*  
entered in the above entitled cause and now on  
record in my office.  
WITNESS my hand and the Seal of this Court *8-19-98*

FREDERICK C. LYON

Clerk

By: *Channen Bird*

Deputy

EXHIBIT

2

000229

[Close](#)

# IDAHO DEPARTMENT OF WATER RESOURCES

## Water Right Report

9/8/2009

WATER RIGHT NO. 65-12096

<u>Owner Type</u>	<u>Name and Address</u>
Current Owner	IDAHO POWER CO PO BOX 70 BOISE, ID 83707 (208)388-2905
Attorney	BARKER RSHOLT & SIMPSON LLP 1010 W JEFFERSON STE 102 PO BOX 2139 BOISE, ID 83701-2139 (208)336-0700
Attorney	IDAHO POWER CO PO BOX 70 BOISE, ID 83707 (208)388-2905

Priority Date: 02/21/1978

Basis: Decreed

Status: Active

<u>Source</u>	<u>Tributary</u>
000230	

NORTH FORK PAYETTE RIVER	PAYETTE RIVER
--------------------------	---------------

Beneficial Use	From	To	Diversion Rate	Volume
POWER	1/01	12/31	2000 CFS	642000 AFA
Total Diversion			2000 CFS	

Location of Point(s) of Diversion:

PAYETTE RIVER	NENE Lt 5	Sec. 26	Township 14N	Range 03E	VALLEY County
------------------	--------------	------------	-----------------	--------------	------------------

POWER Use:

Hydropower Kilowatts: 12420

Place(s) of use:

Place of Use Legal Description: POWER VALLEY County

Township	Range	Section	Lot	Tract	Acres	Lot	Tract	Acres	Lot	Tract	Ac
14N	03E	26	5	NENE							

Conditions of Approval:

1.	RIGHTS 65-02232, 65-02338A, 65-02338X AND 65-12096 WHEN COMBINED SHALL NOT EXCEED A TOTAL DAILY MAXIMUM DIVERSION VOLUME OF 4356 ACRE FEET
----	--

000231

2.	THE RIGHTS FOR THE USE OF WATER CONFIRMED BY THIS RIGHT SHALL BE JUNIOR AND SUBORDINATE TO ALL RIGHTS FOR THE USE OF WATER OTHER THAN HYDROPOWER, WITHIN THE STATE OF IDAHO THAT ARE INITIATED LATER IN TIME THAN THE PRIORITY OF THIS RIGHT AND SHALL NOT GIVE RISE TO ANY RIGHT OR CLAIM AGAINST ANY FUTURE RIGHTS FOR THE USE OF WATER, OTHER THAN HYDROPOWER, WITHIN THE STATE OF IDAHO INITIATED LATER IN TIME THAN THE PRIORITY OF THIS RIGHT.
3.	THIS RIGHT DOES NOT CONSTITUTE IDAHO PUBLIC UTILITIES COMMISSION OR FEDERAL ENERGY REGULATORY COMMISSION APPROVAL THAT MAY BE REQUIRED.
4.	C18 THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. SECTION 42-1412(6), IDAHO CODE.
5.	RIGHTS NO. 65-02232, 65-02338A AND 65-02338X ARE ALSO DIVERTED THROUGH THE POINT OF DIVERSION DESCRIBED ABOVE. THE HYDROPOWER FACILITY IS KNOWN AS CASCADE HYDROELECTRIC PROJECT.

Dates:

Licensed Date:

Decreed Date: 08/29/2002

Permit Proof Due Date: 5/1/1988

Permit Proof Made Date: 10/19/1984

Permit Approved Date: 4/8/1981

Permit Moratorium Expiration Date:

Enlargement Use Priority Date:

Enlargement Statute Priority Date:

Water Supply Bank Enrollment Date Accepted:

000232



Water Supply Bank Enrollment Date Removed:

Application Received Date: 02/21/1978

Protest Deadline Date:

Number of Protests: 0

Other Information:

State or Federal: S

Owner Name Connector: OR

Water District Number:

Generic Max Rate per Acre:

Generic Max Volume per Acre:

Civil Case Number:

Old Case Number:

Decree Plaintiff:

Decree Defendant:

Swan Falls Trust or Nontrust:

Swan Falls Dismissed:

DLE Act Number:

Cary Act Number:

Mitigation Plan: False

Close

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State of Idaho  
Department of Water Resources

# Water Right License

AMENDED

AMENDED

WATER RIGHT NO. 65-12096

Priority: February 21, 1978

Maximum Diversion Rate: 2000.00 CFS

Maximum Diversion Volume: 642000.0 AF

This is to certify, that IDAHO POWER CO  
PO BOX 70

BOISE ID 83707 has complied with the terms and conditions of the permit, issued pursuant to Application for Permit dated February 21, 1978; and has submitted Proof of Beneficial Use on October 19, 1984. An examination indicates that the works have a diversion capacity of 2350.000 cfs of water from:

PAYETTE RIVER, NORTH FORK tributary to PAYETTE RIVER

source, and a water right has been established as follows:

<u>BENEFICIAL USE</u>	<u>PERIOD OF USE</u>	<u>RATE OF DIVERSION</u>	<u>ANNUAL VOLUME</u>
POWER	01/01 to 12/31	2000.00 CFS	642000.0 AF

LOCATION OF POINT(S) OF DIVERSION: Lot 5( NENE), Sec. 26, Township 14N, Range 03E  
VALLEY County

PLACE OF USE: POWER

TWN RGE SEC

14N 03E 26 Lot 5(NENE)

## CONDITIONS OF APPROVAL AND REMARKS

1. This right does not constitute Idaho Public Utilities Commission or Federal Energy Regulatory Commission approval that may be required.
2. Use of water under this right shall be non-consumptive.
3. The rights for the use of water confirmed in this license shall be junior and subordinate to all rights for the use of water other than hydropower, within the State of Idaho that are initiated later in time than the priority of this right and shall not give rise to any right or claim against any future rights for the use of water, other than hydropower, within the State of Idaho initiated later in time than the priority of this right.
4. Use of water under this water right will be regulated by the watermaster of State Water District No. 65.
5. The right holder shall maintain a measuring device and lockable controlling works of a type approved by the Department in a manner that will provide the watermaster suitable control of the diversion.
6. The issuance of this right does not grant any right-of-way or easement across the land of another.

MICROFILMED  
SEP 28 2000

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State of Idaho  
Department of Water Resources

# Water Right License

AMENDED

AMENDED


WATER RIGHT NO. 65-12096

CONDITIONS OF APPROVAL AND REMARKS

7. Rights 65-02232, 65-02338A and 65-02338X are also diverted through the point of diversion described above.
8. The hydropower facility is known as Cascade Hydroelectric Project.
9. Rights 65-02232, 65-02338A, 65-02338X and 65-12096 when combined shall not exceed a total daily maximum diversion volume of 4356 acre feet.

This license is issued pursuant to the provisions of Section 42-219, Idaho Code. The water right confirmed by this license is subject to all prior water rights and shall be administered in accordance with Idaho law and applicable rules of the Department of Water Resources. Signed and sealed this 14<sup>TH</sup> day of JANUARY, 2000.

Acting for

  
KARL J. DREHER, Director

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MICROFILMED  
JAN 28 2000

BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE  
STATE OF IDAHO

IN THE MATTER OF WATER RIGHT )  
LICENSE NO. 65-12096 IN THE NAME ) ORDER GRANTING PETITION  
OF IDAHO POWER CO. ) FOR RECONSIDERATION  
\_\_\_\_\_)

This matter having come before the Department of Water Resources (Department) as a petition to reconsider the issuance of a water right license, the Department makes the following Findings of Fact, Conclusions of Law, and Order

FINDINGS OF FACT

1. On November 8, 1999, the Department issued Water Right License No. 65-12096 (license) to Idaho Power Company (right holder) for the diversion and use of 2000 cfs of water from the North Fork of the Payette River in Valley County for power production purposes.
2. The license was issued as a preliminary order (order) of the Department pursuant to §67-5243, *Idaho Code*, and Rule 730 of the Department's Rules of Procedure (IDAPA 37.01.01.730).
3. On November 9, 1999, the Department mailed a true and correct copy of the order to the right holder.
4. Rule 730.02.a of the Department's Rules of Procedure (IDAPA 37.01.01.730.02.a.) provides in pertinent part as follows:

Any party may file a petition for reconsideration of this preliminary order with the hearing officer issuing the order within fourteen (14) days of the service date of this order. The hearing officer issuing this order will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law.

5. Rule 300 of the Department's Rules of Procedure (IDAPA 37.01.01.300.) provides for the filing of documents by facsimile transmission (fax), but it also requires the original document to be mailed by the next working day.

6. The Department received a facsimile transmission of a petition for reconsideration of the order (petition) from James C. Tucker, the attorney for the right holder. The certificate of service printed on the petition indicates that it was sent by fax and by regular mail on November 23, 1999, *fourteen* days after service date of the order. The Department stamped the petition as received on Wednesday, November 24, 1999, *fifteen* days after the service date of the order.
7. The Department has not received the original petition.
8. As indicated in the petition, the right holder seeks reconsideration of approval condition no. 7 listed on the license.

#### CONCLUSIONS OF LAW


1. The petition may or may not have been filed timely in accordance with Rule 730.02.a. of the Department's Rules of Procedure (IDAPA 37.01.01.730.02.a.).
2. In the absence of further evidence demonstrating that the petition was not filed timely, it is reasonable for the Department to regard the petition as timely.
3. The Department should grant the petition to provide an opportunity for evaluating the changes requested by the right holder.

#### ORDER

IT IS HEREBY ORDERED that the petition for reconsideration of the preliminary order issuing Water Right License No 65-12096 is **GRANTED** pursuant to §67-5243, *Idaho Code*, to provide the Department an opportunity to evaluate the changes requested by the right holder.

IT IS FURTHER HEREBY ORDERED that the Department retains jurisdiction to re-evaluate the timeliness of the petition if additional relevant evidence is presented.

Dated this 30<sup>th</sup> day of NOVEMBER, 1999.

  
NORMAN C. YOUNG  
Administrator, Water Management Division

State of Idaho  
Department of Water Resources  
**Water Right License**

WATER RIGHT NO. 65-12096

Priority: February 21, 1978      Maximum Diversion Rate: 2000.00 CFS  
Maximum Diversion Volume: 642000.0 AF

This is to certify, that IDAHO POWER CO

PO BOX 70

BOISE ID 83707

has complied with the terms and conditions of the permit, issued pursuant to Application for Permit dated February 21, 1978; and has submitted Proof of Beneficial Use on October 19, 1984. An examination indicates that the works have a diversion capacity of 2350.000 cfs of water from:

PAYETTE RIVER, NORTH FORK      tributary to PAYETTE RIVER

source, and a water right has been established as follows:

<u>BENEFICIAL USE</u>	<u>PERIOD OF USE</u>	<u>RATE OF DIVERSION</u>	<u>ANNUAL VOLUME</u>
POWER	01/01 to 12/31	2000.00 CFS	642000.0 AF

LOCATION OF POINT(S) OF DIVERSION: Lot 5 ( NENE), Sec. 26, Township 14N, Range 03E  
VALLEY County

PLACE OF USE: POWER

TWN RGE SEC

14N 03E 26      Lot 5 (NENE)

CONDITIONS OF APPROVAL AND REMARKS

1. This right does not constitute Idaho Public Utilities Commission or Federal Energy Regulatory Commission approval that may be required.
2. Use of water under this right shall be non-consumptive.
3. The rights for the use of water confirmed in this license shall be junior and subordinate to all rights for the use of water other than hydropower, within the State of Idaho that are initiated later in time than the priority of this right and shall not give rise to any right or claim against any future rights for the use of water, other than hydropower, within the State of Idaho initiated later in time than the priority of this right.
4. Use of water under this water right will be regulated by the watermaster of State Water District No. 65.
5. The right holder shall maintain a measuring device and lockable controlling works of a type approved by the Department in a manner that will provide the watermaster suitable control of the diversion.
6. The issuance of this right does not grant any right-of-way or easement across the land of another.

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State of Idaho  
Department of Water Resources

## Water Right License

WATER RIGHT NO. 65-12096

CONDITIONS OF APPROVAL AND REMARKS

7. The diversion and use of water for hydropower purposes under this license is subject to review by the Director after the date of expiration of license 2848 issued by the Federal Energy Regulatory Commission. Upon appropriate findings relative to the interest of the public, the Director may cancel all or any part of the use authorized herein and may revise, delete or add conditions under which the right may be exercised.
8. Rights 65-02232, 65-02338A and 65-02338X are also diverted through the point of diversion described above.
9. The hydropower facility is known as Cascade Hydroelectric Project.
10. Rights 65-02232, 65-02338A, 65-02338X and 65-12096 when combined shall not exceed a total daily maximum diversion volume of 4356 acre feet.

This license is issued pursuant to the provisions of Section 42-219, Idaho Code. The water right confirmed by this license is subject to all prior water rights and shall be administered in accordance with Idaho law and applicable rules of the Department of Water Resources. Signed and sealed this 8<sup>th</sup> day of NOVEMBER, 1999.

**SUPERSEDED**  
Acting for KARL J. DREHER, Director

MICROFILMED

JAN 28 2000



ROSHOLT, ROBERTSON & TUCKER

Chartered  
ATTORNEYS AT LAW

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JOHN A. ROSHOLT  
J. EVAN ROBERTSON  
JAMES C. TUCKER  
GARY D. SLETTE  
JERRY V. JENSEN  
JOHN K. SIMPSON  
TIMOTHY J. STOVER  
NORMAN M. SEMANKO

RECEIVED

JAN 13 2000

Department of Water Resources

January 12, 2000

Norman C. Young  
Administrator, Water Management Division  
Idaho Department of Water Resources  
1301 North Orchard Street  
P.O. Box 83720  
Boise, Idaho 83720-0098

Re: Water Right License # 65-12096 - Idaho Power Company

Dear Mr. Young:

I appreciate having the opportunity to meet with you and Phil Rassier to discuss the pending *Petition for Reconsideration* filed on behalf of the Idaho Power Company with regard to the above referenced water right license. As I explained during our meeting, the principal issue of concern to Idaho Power is *condition # 7* of the license that renders the license subject to review by the Director upon the expiration of the FERC license for the Cascade Project (Project #2848) and allows for either the cancellation of the water license or the deletion or addition of conditions under which the right may be exercised.

I understand that the basis for that condition is I. C. § 42-203B(7), which provides that the director may "limit a permit or license for power purposes to a specific term". While Idaho Power questions the constitutionality of that provision in light of Art. XV, Sec. 3 of the Idaho Constitution, it seems unnecessary to tackle that issue in light of the administrative history of this water right. As you know, § 42-203B was added to the Idaho Code in 1986. Our records indicate that the administrative process involving this license proceeded as follows:

Water right application filed - February 21, 1978

IPC Petition for Immediate Issuance of Permit filed - December 8, 1980

Application approved (POBU due 5/31/83) - April 8, 1981

Request for extension of time to file POBU - March 23, 1983

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Norman C. Young  
January 12, 2000  
Page 2

POBU filed -	October 19, 1984
Field exam completed -	July 30, 1986
File transferred to IDWR State office -	July 30, 1986
License issued -	November 8, 1999

It is clear from the above that a permit for the water right was issued in 1981 and Idaho Power complied with all administrative requirements for the issuance of the license by the end of October 1984, nearly two years prior to the enactment of § 42-203B(7) and fifteen years prior to the issuance of the license. Under these specific circumstances we consider the application of the term limitation in the license under § 42-203B to be inappropriate and would again request that *condition # 7* be removed.

Again, thank you for your consideration of this matter and we await your response. If we can offer anything further or answer any questions, please contact me.

Very truly yours,



James C. Tucker

cc: B. Stahman  
N. Gardiner

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## MEMORANDUM

DATE: January 10, 2000

TO: Water Right File 65-12096

FROM: Shelley W. Keen *SUK*

RE: Meeting to discuss the petition for reconsideration

---

On Friday, December 17, 1999, IDWR staff met with James C. Tucker to discuss his petition for reconsideration of Water Right License 65-12096. Representing IDWR were Norm Young, Phil Rassier, and Shelley Keen. Mr. Tucker said that Idaho Power Company is uncomfortable with the temporal provisions of the license. As a permanent property right it adds some value to the company's ledger sheet because it could be sold or transferred. For example, if Idaho Power Company does not retain the FERC license to operate at Cascade, it could still potentially retain and sell the water right license. However, if the water right license can be revoked its value is significantly diminished. As Mr. Rassier summarized, "If the FERC license is revoked, is there anything to prevent the state from re-allocating the water used under this license?"

Mr. Tucker also raised the following issues.

- Did the 1928 amendment to the Idaho Constitution really intend for Idaho Power Co. to have less ability to acquire property rights than other water appropriators? Mr. Tucker raised the question but indicated that he does not intend for this question to be pursued in this forum or at this time.
- Permit 65-12096 was issued five years before Section 42-203B(7), *Idaho Code*, was passed by the legislature. Can't Permit 65-12096 be excluded because of some "grandfather" consideration? The language of the statute seems pretty clear that there is no grandfather provision.
- Condition No. 7 on the license is rather broad. Can it be rewritten to describe in more detail the process through which the license might be canceled or changed? Mr. Young suggested wording similar to the statement placed in minimum stream flow licenses.

The meeting ended with Mr. Tucker promising to review an example of the minimum stream flow language and to make some suggestions to IDWR.

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# CONSTITUTION OF THE STATE OF IDAHO

## ARTICLE XV WATER RIGHTS

SECTION 3. WATER OF NATURAL STREAM -- RIGHT TO APPROPRIATE -- STATE'S REGULATORY POWER--PRIORITIES. The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes. Priority of appropriation shall give the better right as between those using the water; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any other purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes. And in any organized mining district those using the water for mining purposes or milling purposes connected with mining, shall have preference over those using the same for manufacturing or agricultural purposes. But the usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public and private use, as referred to in section 14 of article I of this Constitution.

The Idaho Code is made available on the Internet by the Idaho Legislature as a public service. This Internet version of the Idaho Code may not be used for commercial purposes, nor may this database be published or repackaged for commercial sale without express written permission.

Available Reference: [Search Instructions](#)

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JAN 28 2000 12/17/99



State of Idaho

**DEPARTMENT OF WATER RESOURCES**

1301 North Orchard Street, P.O. Box 83720, Boise, Idaho 83720-0098

Phone: (208) 327-7900 FAX: (208) 327-7866

DIRK KEMPTHORNE  
GOVERNOR

KARL J. DREHER  
DIRECTOR

November 30, 1999

IDAHO POWER COMPANY  
C/O JAMES C TUCKER  
ROSHOLT, ROBERTSON & TUCKER  
PO BOX 2139  
BOISE ID 83701-2139

RE: Petition for Reconsideration of Order issuing Water Right License 65-12096

Dear Mr. Tucker:

I have enclosed a copy of an order granting your petition for reconsideration of the preliminary order issuing Water Right License No. 65-12096. I think it would be useful to meet to discuss the concerns raised in your petition. I will direct my staff to contact you in a few days to schedule the meeting as soon as possible.

If you have any questions regarding this matter, please call me at 327-7900.

Sincerely,

Norman C Young  
Administrator, Water Management Division

NCY:swk

Enclosure

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JAN 28 2000

IDAHO POWER COMPANY  
Attorneys' Names and Addresses:

JAMES C. TUCKER  
Rosholt, Robertson & Tucker  
P. O. Box 2139  
1221 West Idaho St., Suite 600  
Boise, Idaho 83701-2139  
(208) 336-0700  
(208) 344-6034 - Fax  
ISB# 2038

RECEIVED

NOV 24 1999

Department of Water Resources

STATE OF IDAHO  
DEPARTMENT OF WATER RESOURCES

In Re: )  
Water Right No. 65-121096 )  
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PETITION FOR RECONSIDERATION

TO: THE DIRECTOR OF THE IDAHO DEPARTMENT OF WATER RESOURCES

The Idaho Power Company, hereinafter the Petitioner, petitions the Director to reconsider that certain *preliminary order* issued in the form of a *Water Right License* for Water Right No. 65-12096. Specifically, the Petitioner seeks reconsideration of the following condition placed on such water right license:

*7. The diversion and use of water for hydropower purposes under this license is subject to review by the Director after the date of expiration of license 2848 issued by the Federal Energy Regulatory Commission. Upon appropriate findings relative to the interest of the public, the Director may cancel all or any part of the use authorized herein and may revise, delete or add conditions under which the right may be exercised.*

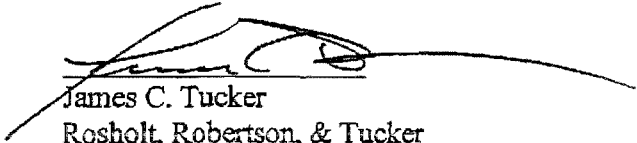
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The grounds for this petition are as follows:


1. The condition constitutes an unreasonable and unauthorized limitation on a water right appropriation as authorized by Article 15, § 3 of the Idaho Constitution.
2. And for such additional and further reasons as may be set forth by the Petitioner in this proceeding.

Dated this 23<sup>rd</sup> day of November, 1999

  
James C. Tucker  
Rosholt, Robertson, & Tucker  
Attorney for Idaho Power Company

CERTIFICATE OF SERVICE

I hereby certify that on this 23<sup>rd</sup> day of November, 1999, I served a true and correct copy of the PETITION FOR RECONSIDERATION on the  
DIRECTOR of the Idaho Department of Water Resources, via FAX and regular mail at:  
1301 N. Orchard Str., P. O. Box 83720, Boise, Idaho 83720-0098.

  
Legal Assistant  
Rosholt, Robertson & Tucker

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tive upstream beneficial users whose rights are acquired pursuant to state law, excluding compliance with the requirements of section 42-203C, Idaho Code.

(4) The user of water for power purposes as beneficiary of the trust established in subsections (2) and (3) of this section shall be entitled to use water available at its facilities to the extent of the water right, and to protect its rights to the use of the water as provided by state law against depletions or claims not in accordance with state law.

(5) The governor or his designee is hereby authorized and empowered to enter into agreements with holders of water rights for power purposes to define that portion of their water rights at or below the level of the applicable minimum stream flow as being unsubordinated to upstream beneficial uses and depletions, and to define such rights in excess thereof as being held in trust by the state under subsection (2) of this section. Such agreements shall be subject to ratification by law. The contract entered into by the governor and the Idaho Power Company on October 25, 1984, is hereby found and declared to be such an agreement, and the legislature hereby ratifies the governor's authority and power to enter into this agreement.

(6) The director shall have the authority to subordinate the rights granted in a permit or license for power purposes to subsequent upstream beneficial depletionary uses. A subordinated water right for power use does not give rise to any claim against, or right to interfere with, the holder of subsequent upstream rights established pursuant to state law. The director shall also have the authority to limit a permit or license for power purposes to a specific term.

Subsection (6) of this section shall not apply to licenses which have already been issued as of the effective date [July 1, 1985] of this act.

(7) The director in the exercise of the authority to limit a permit or license for power purposes to a specific term of years shall designate the number of years through which the term of the license shall extend and for purposes of determining such date shall consider among other factors:

(a) The term of any power purchase contract which is, or reasonably may become, applicable to, such permit or license;

(b) The policy of the Idaho public utilities commission (IPUC) regarding the term of power purchase contracts as administered by the IPUC under and pursuant to the authority of the public utility regulatory policy act of 1978 (PURPA);

(c) The term of any federal energy regulatory commission (FERC) license granted, or which reasonably may be granted, with respect to any particular permit or license for power purpose;

(d) Existing downstream water uses established pursuant to state law.

The term of years shall be determined at the time of issuance of the permit, or as soon thereafter as practicable if adequate information is not then available. The term of years shall commence upon application of water to beneficial use. The term of years, once established, shall not thereafter be modified except in accordance with due process of law. [I.C., § 42-203B, as added by 1985, ch. 17, § 2, p. 23 and ch. 224, § 1, p. 537; am. 1986, ch. 117, § 1, p. 308.]

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JAN 28 2000





State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, P.O. Box 83720, Boise, Idaho 83720-0098

Phone: (208) 327-7900 FAX: (208) 327-7866

November 9, 1999

DIRK KEMPTHORNE  
GOVERNOR

KARL J. DREHER  
DIRECTOR

IDAHO POWER CO  
PO BOX 70  
BOISE ID 83707

RE: WATER RIGHT NO. 65-12096

Dear Water Right Holder(s):

The Department of Water Resources (the Department) has issued the enclosed license confirming that a water right has been established in accordance with the permit referenced above. The license is a preliminary order issued by the Department pursuant to section 67-5243, Idaho Code. It can and will become a final order without further action of the Department unless a party petitions for reconsideration or files an exception and/or brief as described in the enclosed information sheet.

Also, please note that water right owners are required to report any change of water right ownership and/or change of mailing address to the department within 120 days of the change. Failure to report these changes could result in a \$100 late filing fee. Contact any office of the department or visit the department's homepage on the Internet to obtain the proper reporting form.

If you have any questions, please call me at 208-327-7946.

Sincerely,

Shelley W. Keen  
Water Rights Supervisor

SK:klt

Enclosure

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JAN 28 2000

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EXHIBIT

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08/14/2006

IDAHO DEPARTMENT OF WATER RESOURCES  
RECOMMENDED WATER RIGHTS ACQUIRED UNDER STATE LAW

RIGHT NUMBER: 3-7018  
NAME AND ADDRESS: IDAHO POWER CO  
PO BOX 70  
BOISE ID 83707  
SOURCE: SNAKE RIVER TRIBUTARY: COLUMBIA RIVER  
QUANTITY: 5,000.000 CFS  
PRIORITY DATE: 12/24/1975  
POINT OF  
DIVERSION: T17N R05W S2 SESE Lot 3 Within WASHINGTON County  
T08S R47E S25 NESE Lot 9 WM Within BAKER County, Oregon  
Water is diverted by a dam that spans the Snake River between Idaho and Oregon.

PURPOSE AND  
PERIOD OF USE:

<u>PURPOSE OF USE</u>	<u>PERIOD OF USE</u>	<u>QUANTITY</u>
POWER	1/01 12/31	5,000.000 CFS
Power generation is at the Brownlee Dam Power Plant.		

PLACE OF USE: POWER Within WASHINGTON County  
T17N R05W S02 Lot 1 NESE

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

This partial decree is subject to such general provisions necessary for the definition of the rights or for the efficient administration of the water rights as may be ultimately determined by the Court at a point in time no later than the entry of a final unified decree. Section 42-1412(6), Idaho Code.

The rights for the use of the waters under this permit shall be subordinate to and not prevent or interfere with any future upstream diversion and use of the waters of the Snake River and its tributaries for the irrigation of lands or other consumptive beneficial uses in the Snake River watershed.

This permit has been issued subject to Section 42-207, Idaho Code in the event of its sale, transfer, assignment, or its being mortgaged, without a compliance with the provisions of this section, it shall be cancelled and revoked by the Director of the Department of Water Resources.

This right is conditioned upon completion of the appropriation in accordance with the statutory procedure for appropriation of water rights. This right remains subject to all conditions set forth in the permit upon which this right is based, and will be subject to all conditions set forth in the license issued by IDWR upon completion of the statutory appropriation process.

EXPLANATORY MATERIAL: BASIS OF CLAIM - Permit

Filed January 13, 2010  
BETTY J. THOMAS 1:00 P.M. id. P  
Clerk District Court

By Jeanette Anderson Deputy

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF WASHINGTON

\*\*\*\*\*

IDAHO POWER COMPANY,

Petitioner,

v.

IDAHO DEPARTMENT OF  
WATER RESOURCES,

Respondent.

CASE NO. CV-2009-1883

MEMORANDUM DECISION AND  
ORDER ON APPEAL

IN THE MATTER OF LICENSED WATER  
RIGHT NO 03-7018 IN THE NAME OF  
IDAHO POWER COMPANY

I.

NATURE OF THE CASE

Idaho Power Company ("Idaho Power") filed this petition for judicial review of a final agency order issued on March 30, 2009 by the Director of the Idaho Department of Water Resources ("Department"). The aforesaid agency order involved the issuance of Water Right License 03-7018, a hydropower water right license, to Idaho Power. Idaho Power appeals from the agency order, asserting that the Department's insertion of a particular condition into the license, which had **not** been included in the water right

permit previously issued to Idaho Power for the project on January 29, 1976, exceeds the Department's statutory and constitutional authority.

## II.

### FACTUAL AND PROCEDURAL BACKGROUND

The factual background and setting of this case is undisputed. Idaho Power, the State of Idaho, and the Federal Government have a long and fairly well documented history of both cooperation and conflict in the development of hydropower facilities along the Snake River. See e.g., Idaho Power v. State of Idaho, 104 Idaho 575, 661 P.2d 741 (1983). With permission from the State and Federal Government, Idaho Power constructed a series of three hydropower dams in the Hells Canyon stretch of the Snake River in the 1950's. Brownlee Dam, located in Washington County, Idaho, is one of those three, and Idaho Power received a water right license in 1959 for water to service four hydropower generators at Brownlee. That license is not at issue here. In the 1970's, Idaho Power applied for a water right permit to appropriate an additional 5,000 cfs of water to power a fifth hydropower generator at Brownlee Dam. The Department issued a permit, No. 03-7018, on January 29, 1976, as requested for 5,000 cfs, clearing the way for Idaho Power to install the new turbine and diversion works and to begin putting water to the beneficial use of powering the turbine to meet the increasing electrical needs of the region. The Department included two conditions in the permit, which are not at issue here. After receiving the permit, Idaho Power began "proving up" its project as required by Idaho's statutory permit/license scheme for obtaining a water right. See I.C. § 42-202 et. seq. This involved the construction and placement of the fifth power turbine, and then the subsequent application of the

permitted water to beneficial use. Idaho Power asserts that the cost of installing this fifth turbine was approximately \$39,000,000, a figure the State does not contest. After proving up the project as required by law, Idaho Power began putting the permitted 5,000 cfs of water to beneficial use; Idaho Power submitted proof of beneficial use in 1980. (R. p. 83). The Department, on August 27, 1980, issued an acknowledgement of receipt of Idaho Power's proof of beneficial use and responded with a letter to Idaho Power that "before a license can be issued, a field examination must be made" by the Department.

Thereafter, Idaho Power put its permit to full beneficial use and has used its permitted 5,000 cfs for its fifth hydropower generator at Brownlee Dam continuously, and without interference from the Department, up to the date of the issuance of the license, approximately 29 years. This is undisputed. The record shows that in 1985, a Department representative submitted a "Beneficial Use Field Report" confirming that Idaho Power had proved up its project, recommending in a "LICENSING REPORT" that Idaho Power receive its "5,000 cfs as per permit". (R. p. 90). Thereafter, the Department took no additional action to issue the final license for quite some time. In fact, the next action taken by the Department appears in an internal "MEMORANDUM" prepared **twelve years later**, requesting "Ralph Mellin's Assistance with Licensing Idaho Power Company's Permit No. 03-07018". (R. p. 99). The Memo indicated that Mellin's help was needed to resolve questions about the interpretation of the data collected during the 1985 field exam. The Department apparently found no irregularities with the twelve-year old data; however, the Department again let the matter languish, finally issuing the license for Permit No. 03-07018 in November 2007.

(R. p. 130). The facts set forth above, again, are very clear from the record and are not in dispute. The dispute involves a "new" condition inserted into the license by the Department in 2007 which was not one of the conditions included in the water permit issued thirty-two years earlier, before Idaho Power invested \$39,000,000 in developing the water right granted in the permit. It is condition No. 3, found at page 130 of the Agency Record:

The diversion and use of water for hydropower purposes under this license is subject to review by the Director after the date of expiration of the Federal Energy Regulatory Commission license for Brownlee Dam. Upon appropriate findings relative to the interest of the public, the Director may cancel all or any part of the use authorized herein and may revise, delete or add conditions under which the right may be exercised.

Idaho Power argues that the Department lacked statutory authority to insert this additional condition at the time of licensing, and/or that the condition is unconstitutional even if within the ambit of purported legislative authority.

The Department points to I.C. § 42-203B(6) as authority to add the "new" condition. That statute states "[t]he director shall have the authority to subordinate the rights granted in a permit or license for power purposes to subsequent upstream beneficial depletionary uses [and] **[t]he director shall also have the authority to limit a permit or license for power purposes to a specific term.**" (Emphasis added).

The Department contends that condition No. 3 in the license is such a "term" limit. Subsections (6) and (7) were added to I.C. § 42-203B by the Idaho Legislature in 1985, approximately five years after Idaho Power began putting the water to beneficial use under the permit. The last sentence of I.C. § 42-203B(6) states that "[s]ubsection (6) of this section shall not apply to licenses which have already been issued as of the effective date [July 1, 1985] of this act", clearly forbidding the Department from adding a

term limit to a license issued before the section's enactment. The Department's position relative to the license in this case is that the legislature's inclusion of the word "license", and not the word "permit" in the last sentence is indicative of a grant of authority to include term limits in all licenses issued after 1985, even on those where the permits were issued prior to 1985. Idaho Power disagrees and argues that the Department should be ordered to issue the license without Condition No. 3's term restriction on the water right.

### III.

#### ISSUES ON APPEAL

- A. Whether or not inclusion of Condition No. 3 in Water Right License 03-07018 is in violation of the Idaho Code.
- B. Whether or not Petitioner's constitutional rights have been violated by the inclusion of Condition No. 3.

### IV.

#### STANDARD OF REVIEW

Judicial review of a final decision of the director of the Department is governed by the Idaho Administrative Procedure Act (IDAPA), chapter 52, Title 67, Idaho Code. I.C. § 42-1701A(4). IDAPA governs the review of local administrative decisions. Urrutia v. Blaine County, 134 Idaho 353, 2 P.3d 738 (2000). This Court does not substitute its judgment for that of the agency as to the weight of the evidence presented. *Id.* The Court instead defers to the agency's findings of fact unless they are clearly erroneous. *Id.* The agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record. *Id.*



The Court is further limited in its scope of review, and is directed to examine only whether the agency action ran afoul of those grounds set out in Idaho Code § 67-5279(3), which examine whether the actions:

- (a) violate statutory or constitutional provisions;
- (b) exceed the agency's statutory authority;
- (c) are made upon unlawful procedure;
- (d) are not supported by substantial evidence; or
- (e) are arbitrary, capricious, or an abuse of discretion.

*Id.* The party challenging an action under Idaho Code § 67-5279(3) must first illustrate that the agency erred in a manner specified in Idaho Code § 67-5279(3) and must then show that a substantial right of the party has been prejudiced. Price v. Payette County Bd. Of County Comm'rs, 131 Idaho 426, 958 P.2d 583 (1998). If the Board's action is not affirmed, "it shall be set aside ... and remanded for further proceedings as necessary." *Id.*, I.C. § 67-5279(3).

## V.

### ANALYSIS

#### A. Was inclusion of Condition No. 3 in Violation of Idaho Code?

As a preliminary matter, this Court will indicate that the Department cites only to I.C. § 42-203B(6) as the statutory authority to include condition 3 in the Water License issued to Idaho Power, and the Department asserts that its intention is to use condition no. 3 as a term limit on the license. The portions of the statute which discuss term limits on hydropower licenses state:

6. . . . The director shall also have the authority to limit a permit or license for power purposes to a specific term. Subsection (6) of this section shall not apply to licenses which have already been issued as of the effective date [July 1, 1985] of this act.

7. The director in the exercise of the authority to limit a permit or license for power purposes to a specific term of years shall designate the number of years through which the term of the license shall extend and for purposes of determining such date shall consider among other factors:
- a. The term of any power purchase contract which is, or reasonably may become, applicable to, such permit or license;
  - b. The policy of the Idaho public utilities commission (IPUC) regarding the term of power purchase contracts as administered by the IPUC under and pursuant to the authority of the public utility regulatory police act of 1978 (PURPA);
  - c. The term of any federal energy regulatory commission (FERC) license granted, or which reasonably may be granted, with respect to any particular permit or license for power purposes;
  - d. Existing downstream water uses established pursuant to state law.

The term of years shall be determined at the time of issuance of the permit, or as soon thereafter as practicable if adequate information is not then available. The term of years shall commence upon application of water to beneficial use. The term of years, once established, shall not thereafter be modified except in accordance with due process of law.

The goal of statutory interpretation is to discover the intention of the legislature in drafting a statute, and to apply the statute accordingly, examining not only the literal words of the statute, but also the reasonableness of proposed constructions, the public policy behind the statute, and its legislative history. Hayden Lake First Prot. Dist. v. Alcorn, 141 Idaho 388, 111 P.3d 73 (2005). Constructions that would lead to absurd or unreasonably harsh results are disfavored. In re Daniel W., 145 Idaho 677, 183 P.3d 765 (2008). Statutory provisions cannot be read in a vacuum or in isolation, as all of the sections of applicable statutes must be construed together so as to determine the legislature's intent. Lockhart v. Dept. of Fish and Game, 121 Idaho 894, 828 P.2d 1299 (1992). Statutes must be read to give effect to every word and construed so no part is

rendered superfluous or insignificant. Moreland v. Adams, 143 Idaho 687, 152 P.2d 558 (2007). It is the general rule in Idaho that a statute should not be applied retroactively in the absence of a clear legislative intent to that effect. I.C. § 73-101; Matter of Hidden Springs Trout Ranch, Inc., 102 Idaho 623, 636 P.2d 745 (1981). Finally, there is a strong presumption that legislative enactments are constitutional and courts are obligated to seek an interpretation that will save the statute from constitutional infirmity. State v. Richards, 127 Idaho 31, 896 P.2d 357 (Ct. App. 1995).

Water law is deeply enmeshed in the history of the State of Idaho and is governed by the Idaho Constitution, the Idaho Code, and caselaw. The code section at issue here was simply one amendment in a long development of the statutory scheme that regulates the exercise of the constitutional right to appropriate waters. It is assumed that when the legislature enacts or amends a statute it has full knowledge of the existing judicial decisions and case law of the state. George W. Watkins Family v. Messenger, 118 Idaho 537, 797 P.2d 1385 (1990). In addition, the legislature is presumed not to intend to overturn long established principles of law unless an intention to do so plainly appears by express declaration or the language employed admits of no other reasonable construction. Id.

The Department supports its contention that I.C. § 42-203B grants authority to insert Condition No. 3, essentially a term limit, into this license by suggesting that the legislature's use of the phrase "[s]ubsection (6) of this section shall not apply to licenses which have already been issued as of the effective date [July 1, 1985] of this act" evidences the legislature's intent that term limits could apply to **any and all** nonlicensed permits, whether issued before or after the 1985 enactment. In support

of that argument, the Department argues that the holder of a permit, as opposed to a license, has nothing more than an inchoate right or the hope of a water right.

Therefore, goes the argument, the legislature took away nothing, other than a "hope", from those appropriating water under a non-licensed permit issued prior to the term limit enactment in 1985. The latter assertion is only partially born out by legal precedent.

True, the cases are clear that a person who has **simply filed a permit application** has only an inchoate right. Hidden Springs Trout Ranch, supra. However, the cases so holding involve only those who have done nothing more than to apply for a permit or who hold a permit but are yet to appropriate the water. This Court believes that is a significant distinction. The Hidden Springs Court held that a new amendment to I.C. § 42-203 could be applied by the Department to a permit application that was pending when the amendment took effect. That case did not involve the same facts as this case, but that Court did note that an "applicant gains but an inchoate right upon filing of the application which **may ripen into a vested interest following proper statutory adherence.**" 102 Idaho at 625 (emphasis added).

Idaho water law has historically enshrined the act of appropriation of water to beneficial use as an act of paramount legal significance in relation to defining a property right in water:

The consistent thread in Idaho's Constitution and water statutes is that the right to use water must be acquired by appropriation. The Idaho Supreme Court has long held that the method to acquire water in Idaho is by appropriation and the state may regulate the means of appropriating water within the State. Speer v. Stephenson, 16 Idaho 707, 102 P. 365 (1909).

1997 Idaho Op. Atty. Gen. 97-1. Historically, one could perfect a right in water through either a simple appropriation under the "constitutional" approach, or by applying for a

permit, appropriating under the permit, and obtaining a license. Under the latter, the priority date relates back to the issuance of the permit, but the right itself only is acquired upon appropriation. In 1971, the legislature mandated the permit/license scheme and no other. See Barber, STATUTORY WATER RIGHTS PERMITS: A NECESSARY PROBLEM IN REAL PROPERTY CONVEYANCING, Idaho Law Review Vol. 9, No. 1, 1972; United States v. Pioneer Irr. Dist., 144 Idaho 106, 157 P.3d 600 (2007). The Pioneer Irrigation District case did not involve the precise issue at bar, but in resolving the issues therein, that Court placed great reliance upon the significance of the act of appropriating water to beneficial use in acquiring a property right, noting that it is a “well-settled rule of public policy that the right to the use of the public water of the state can only be claimed where it is applied to beneficial use in the manner required by law.” Id., 144 Idaho at 110, quoting Albrethsen v. Wood River Land Co., 40 Idaho 49, 231 P. 418 (1924). The Pioneer Court noted that under the so-called statutory method, “the appropriation is not complete and a license will not issue until there is proof of application to beneficial use for the purpose . . . originally intended.” 144 Idaho at 110. “Under either the constitutional or statutory method of appropriation, the appropriator must apply the water to a beneficial use in order to have a valid water right in Idaho.” Id. In Pioneer, the Court concluded that although the Bureau of Reclamation actually held the water right license, it was the landowners who actually apply the water to beneficial use who have an equitable interest that was “stronger than mere contractual expectancy” due to its conclusion that beneficial use determines water right ownership. Those principles date back one hundred years or more.

In Washington State Sugar Co. v. Goodrich, 27 Idaho 26, 147 P. 1073 (1915),

the Court stated:

The granting by the state engineer of a permit for the right to use the waters of this state, in and of itself secures to the applicant no right to the use of the waters applied for in said permit, unless there be a substantial compliance with each and every provision of the statute relating to or in any manner affecting the issuance of such permit and a fulfillment of the conditions and limitations therein, but a compliance with the conditions and limitations prescribed in such permit initiates a right to the use of the water in the applicant, and said right then becomes a vested one and dates back to the issuance of said permit.

147 P. at 1066. In the case of Speer v. Stephenson, 16 Idaho 707, 102 P. 365 (1909),

the Court discussed the effect of what at the time was the new statutory scheme that replaced the "posting of notice" method of appropriation with the "permit" method:

The permit thus provided for took the place of the posting of notice as required under the act prior to 1903, and merely gave the applicant an inchoate right which could ripen into a legal and complete appropriation only upon the completion of the works and the application of the water to a beneficial use.

102 P. at 368. That Court also noted another aspect of the 1903 permit statute that

has a marked similarity to the one currently compiled at I.C. § 42-219. The Speer

Court noted that the statute required the permittee to submit proof of beneficial use, and quoted the statutory procedure as:

Upon receipt by the state engineer of all the evidence in relation to such final proof, it shall be his duty to carefully examine the same, and, if he is satisfied that the law has been fully complied with and that the water is being used at the place claimed and for the purpose for which it was originally intended, he shall issue to such user or users a license confirming such use.

102 P. at 368. The Speer court stated that under this permit/license scheme, "by

pursuing the successive steps prescribed in the statute and completing his diverting

works and applying the water to a beneficial purpose, the appropriation is completed."

Id. The license itself is prima facie evidence of a water right, confirming the water right, but it is upon proof of beneficial use under permit when the right, or entitlement, is created. Bassinger v. Taylor, 30 Idaho 289, 164 P. 522 (1917).

Given that historical precedent, the Court cannot accept the Department's contention that Idaho Power, in this case, holds only an inchoate right or the hope of a right, and is stuck in that legal limbo for as many decades as it may take the Department to complete the largely ministerial task of issuing the license. By completing a \$39,000,000 project and beneficially appropriating water under that permit for 27 years, Idaho Power clearly holds something more than the mere hope of a water right. The question is, did the legislature intend to strip away whatever rights Idaho Power held, simply because the Department could have but did not issue the final "license" prior to the 1985 enactment? This Court is constrained to conclude that the legislature did not so intend.

The language of I.C. § 42-203B(7) is critical in and of itself, as well as its relation to the pre-existing statutes governing issuance of permits and licenses. There can be no question that the legislature mandated that any term limit be included in the permit (or as soon as practicable thereafter) **and** that the term of years **shall** commence upon application of the water to beneficial use. I.C. § 42-203B(7). The plain reading conveys the legislative intent that a term limit be included prior to appropriation of the water to beneficial use. Such construction is consistent with a reasonable approach under which a potential hydropower appropriator can obtain a permit with eyes wide open as to the conditions and restrictions **before** embarking upon an expensive water

project. Conversely, the notion that the Department can grant a permit and authorize a permittee to invest substantially in a project, and then after completion of the works and commencement of beneficial use, insert significant new restrictions, strikes the Court as an unreasonably harsh interpretation; the Court sees nothing in the statutory language evidencing an intent to work such a hardship or oppressive result. See, e.g. Lawless v. Davis, 98 Idaho 175, 560 P.2d 497 (1977). Idaho Power had completed all requirements for the final license by 1980. Were the Court to interpret the statute in the manner asserted by the Department, essentially stripping away Idaho Power's rights because the Department delayed issuance of the license for many years, during which time the law changed, the end result for Idaho Power would be oppressive.

The former interpretation is entirely compatible with the other sections governing the steps toward licensing. Section 202 governs the process by which a person must file a very detailed application for a water right permit. I.C. § 42-202. That was done in this case in 1975. Section 203A governs the Department's options for handling an application for a permit. I.C. § 42-203A. That section provides for public notice, public hearings, and lists a number of criteria such as "public interest" upon which the Department can base a denial of the permit. That section also grants authority for the Department to issue a permit for less water than applied for, or to issue a "permit upon conditions." In fact, that was done in this case; the Department issued a permit with two conditions, significant in scope, but not at issue here. Next, Sections 204 to 218 set forth a number of requirements that the permit holder must satisfy, culminating in his/her filing proof of beneficial use under the permit. I.C. § 42-204 – 218. If an applicant deems the conditions of the permit to be onerous, he can simply abandon or



forfeit it before making the substantial investment. See, e.g. Hardy v. Higginson, 123 Idaho 485, 849 P.2d 946 (1993). However, if the permittee proceeds according to law, I.C. § 42-219 describes the Department's obligations thereafter:

Upon receipt by the department of water resources of all the evidence in relation to such final proof, it shall be the duty of the department to carefully examine the same, and if the department is satisfied that the law has been fully complied with and that the water is being used at the place claimed and for the purpose for which it was originally intended, the department shall issue to such user or users a license confirming such use.

In this case, it is undisputed that Idaho Power fully complied with the law and the terms of the permit. It appears, therefore, that the Department had little, if any, authority to deny a license confirming the use set forth in the permit. Reading Sections 203A, 203B, and 219 together, as the Court must, the Court is convinced that the legislature intended that significant restrictions such as a term limit on a permit/license based upon public interest be handled at the outset, in the permitting process, and not as an afterthought during the culmination of the licensing process.

Taking into consideration all of the relevant statutory provisions, the important public policies embodied therein, the long history of judicial decisions existing at the time of the relevant amendment to I.C. § 42-203B, the lack of a clearly expressed intention to overturn existing precedent or to apply the "term limits" retroactively to those who had filed proof of beneficial use under a permit prior to the enactment of the amendment, this Court concludes that the Department's attempt to include condition number 3 in the license exceeded the Department's statutory authority and/or violates those statutory provisions.

B. Whether Idaho Power has established a Constitutional Violation


Based upon the Court's resolution of the first issue, the Court concludes that it need not address the other issues raised by Idaho Power, including whether or not a violation of a constitutional right has occurred.

VI.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the matter is remanded to the Idaho Department of Water Resources and further, that the Department strike Condition Number 3 from the license and that the Department issue a license pursuant to the terms found within the permit and consistent with this opinion.

Dated this 13 day of January, 2010.

A handwritten signature in black ink, appearing to read "Susan E. Wiebe", is written over a horizontal line.

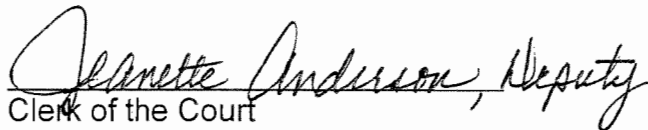
Susan E. Wiebe  
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing order was forwarded to the following persons on this 13<sup>th</sup> day of January, 2010.

John K. Simpson  
BARKER ROSHOLT & SIMPSON LLP  
1010 W. Jefferson, Suite 102  
P.O. Box ~~485~~ 2139  
Boise, ID 8370~~2~~ 1-2139

Garrick L. Baxter  
Deputy Attorney General  
Idaho Dept. Of Water Resources  
322 East Front St.  
P.O. Box 83720  
Boise, ID 83720

  
Clerk of the Court

LAWRENCE G. WASDEN  
Attorney General

CLIVE J. STRONG  
Deputy Attorney General  
Chief, Natural Resources Division

PHILLIP J. RASSIER, ISB #1750  
GARRICK L. BAXTER, ISB #6301  
Deputy Attorneys General  
P.O. Box 83720  
Boise, ID 83720-0098  
Telephone: (208) 287-4800  
phil.rassier@idwr.idaho.gov  
garrick.baxter@idwr.idaho.gov

Filed January 26, 2010 P  
BETTY J. THOMAS 8:40 A. M.  
Clerk District Court  
By Janeeth Anderson Deputy

Attorneys for Respondent-Appellant

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF WASHINGTON

IDAHO POWER COMPANY, )  
 )  
Petitioner-Respondent, )  
 )  
v. )  
 )  
THE IDAHO DEPARTMENT OF WATER )  
RESOURCES, )  
 )  
Respondent-Appellant. )  
 )  
 )

Case No. CV-2009-1883

NOTICE OF APPEAL

(Filing Fee: Exempt)

IN THE MATTER OF LICENSED WATER )  
RIGHT NO. 03-7018 IN THE NAME OF IDAHO )  
POWER COMPANY )  
 )  
 )

TO: THE ABOVE NAMED RESPONDENT, IDAHO POWER COMPANY, AND ITS  
ATTORNEYS OF RECORD:

JAMES C. TUCKER  
IDAHO POWER COMPANY  
1221 West Idaho Street  
P.O. Box 70  
Boise, ID 83707-0070

JOHN K. SIMPSON  
SHELLEY M. DAVIS  
SCOTT A. MAGNUSON  
BARKER ROSHOLT & SIMPSON, LLP  
1010 W. Jefferson Ste 102  
P.O. Box 2139  
Boise, ID 83701-2139

AND

TO: THE CLERK OF THE ABOVE ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above named appellant, the IDAHO DEPARTMENT OF WATER RESOURCES ("Department"), appeals against the above named respondent to the Idaho Supreme Court from the district court's MEMORANDUM DECISION AND ORDER ON APPEAL, entered in the above entitled action on the 13<sup>th</sup> day of January 2010, the Honorable Judge Susan E. Wiebe presiding.
2. The above named appellant has a right to appeal to the Idaho Supreme Court, and the order described in paragraph 1 is an appealable order pursuant to Rule 11(f), Idaho Appellate Rules.
3. The appellant's preliminary statement of the issues it intends to assert on appeal, which under Rule 17, Idaho Appellate Rules, does not prevent appellants from asserting other issues, is as follows:
  - a. Whether the district court erred in holding that Idaho Code § 42-203B does not authorize the Department to add a condition limiting a hydropower water right to a specific term at the time of licensing;
  - b. Whether the district court erred in concluding that the legislature did not intend by its enactment of Idaho Code § 42-203B to authorize the Department to add a condition limiting a hydropower water right to a specific term at the time of licensing.
4. No order has been entered sealing all or any part of the record in the above entitled action.
5. No transcript is requested.

6. The appellants request that the following be included in the clerk's record in addition to those automatically included under Rule 28, Idaho Appellate Rules:

	<u>Date</u>	<u>Document</u>
01	06/08/09	Agency Record

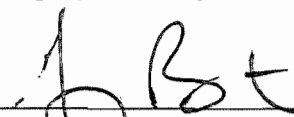
7. I certify:

- a. No reporter has been served because no transcript is requested.
- b. The estimated transcript fee has not been paid because no transcript is requested.
- c. That the appellant and the State of Idaho are exempt from paying the clerk of the above entitled court the estimated fee for preparation of the clerk's record pursuant to Idaho Code § 67-2301.
- d. That the appellant and the State of Idaho are exempt from paying the appellate filing fee pursuant to Idaho Code § 67-2301.
- e. That service has been made upon all parties required to be served pursuant to Rule 20, Idaho Appellate Rules.

DATED this 25 day of January 2010.

LAWRENCE G. WASDEN  
ATTORNEY GENERAL

CLIVE J. STRONG  
Chief, Natural Resources Division  
Deputy Attorney General

  
\_\_\_\_\_  
GARRICK L. BAXTER  
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25 day of January, 2010, I caused to be served a true and correct copy of the foregoing NOTICE OF APPEAL to the following parties by the indicated methods:

District Court Clerk  
Washington County  
256 East Court  
P.O. Box 670  
Weiser, ID 83672-0670

☒ U.S. Mail, postage prepaid  
☐ Hand Delivery  
☐ Express Mail  
☐ Facsimile: (208) 414-3925  
☐ E-mail:

John K. Simpson  
Shelley M. Davis  
Scott A. Magnuson  
BARKER ROSHOLT &  
SIMPSON, LLP  
1010 W. Jefferson Ste 102  
P.O. Box 2139  
Boise, ID 83701-2139

☒ U.S. Mail, postage prepaid  
☐ Hand Delivery  
☐ Express Mail  
☐ Facsimile: (208) 344-6034  
☐ E-mail: [jks@idahowaters.com](mailto:jks@idahowaters.com)

James C. Tucker  
Senior Attorney.  
IDAHO POWER COMPANY  
1221 West Idaho Street  
P.O. Box 70  
Boise, ID 83707-0070

☒ U.S. Mail, postage prepaid  
☐ Hand Delivery  
☐ Express Mail  
☐ Facsimile: 388-6936  
☐ E-mail: [jamestucker@idahopower.com](mailto:jamestucker@idahopower.com)

  
GARRICK L. BAXTER  
Deputy Attorney General

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF WASHINGTON

IN THE MATTER OF LICENSED WATER	)	
RIGHT NO. 03-0718 IN THE NAME OF	)	
IDAHO POWER COMPANY	)	
-----	)	Supreme Court Case No. 37348-2010
IDAHO POWER COMPANY,	)	
	)	
Petitioner/Respondent,	)	CERTIFICATE OF SERVICE
	)	TO COUNSEL
-VS-	)	
	)	
THE IDAHO DEPARTMENT OF	)	
WATER RESOURCES,	)	
	)	
Respondent/Appellant.	)	
_____	)	

I, BETTY J. THOMAS, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Washington, do hereby certify that I have personally served or mailed, by United States Mail, one copy of the CLERK'S RECORD to each of the Attorneys of Record in this cause as follows:

James C. Tucker  
Senior Attorney  
Idaho Power Company  
1221 West Idaho Street  
Boise, ID 83702-5627

Attorney for Respondent

Lawrence G. Wasden  
Attorney General  
Garrick L. Baxter  
Deputy Attorney General  
Idaho Dept of Water Resources  
P. O. Box 83720  
Boise, ID 83720-0098

Attorney for Appellant

CERTIFICATE OF SERVICE  
TO COUNSEL

1

000272



IN WITNESS WHEREOF, I have hereunto set my hand and affixed  
the seal of said Court this \_\_\_\_\_ day of \_\_\_\_\_, 2010.

BETTY J. THOMAS  
Clerk of the District Court

By: \_\_\_\_\_  
Deputy Clerk

cc: Stephen W. Kenyon

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF WASHINGTON

IN THE MATTER OF LICENSED WATER RIGHT NO. 03-0718 IN THE NAME OF IDAHO POWER COMPANY, -----	)	
IDAHO POWER COMPANY,	)	
Petitioner/Respondent,	)	Supreme Court Case No. 37348-2010
-vs-	)	Civil No. CV 2009-01883
THE IDAHO DEPARTMENT OF WATER RESOURCES,	)	
Respondent/Appellant.	)	CLERK'S CERTIFICATE TO THE RECORD AND EXHIBITS

I, Betty J. Thomas, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for Washington County, do hereby certify that the foregoing Clerk's Record in the above entitled cause was compiled and bound under my direction and contains true and correct copies of the pleadings, documents and papers designated to be included under Rule 28, I.A.R. of the Idaho Appellate Rules, the Notice of Appeal and the Amended Notice of Appeal.

I certify that there were no exhibits marked for identification or admitted into evidence during the course of this action.

I further certify that the following will be submitted as an exhibit to this Record on Appeal:

**Agency's Record on Appeal, Volume I and II**

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal this \_\_\_\_\_ day of \_\_\_\_\_, 2010.

---

BETTY J. THOMAS  
Clerk of the District Court

James C. Tucker, ISB No. 2038  
Senior Attorney  
IDAHO POWER COMPANY  
1221 West Idaho Street  
Boise, ID 83702-5627  
Telephone: (208) 388-2112  
Facsimile: (208) 388-6935

John K. Simpson, ISB # 4242  
Shelley M. Davis, ISB #6788  
Scott A. Magnuson, ISB #7916  
BARKER ROSHOLT & SIMPSON LLP  
1010 W. Jefferson, Suite 102  
P.O. Box 485  
Telephone: (208) 336-0700  
Facsimile: (208) 344-6034

*Attorneys for:* IDAHO POWER COMPANY

Filed Feb 8, 2010 P  
BETTY J. THOMAS 8:45AM.  
Clerk District Court  
By Charles Sloan Deputy

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF WASHINGTON

IDAHO POWER COMPANY,	)	Case No: CV-2009-1883
	)	
Petitioner-Respondent,	)	<b>IDAHO POWER'S REQUEST FOR</b>
	)	<b>ADDITIONAL TRANSCRIPT AND</b>
v.	)	<b>DOCUMENTS IN THE RECORD</b>
	)	
IDAHO DEPARTMENT OF WATER	)	
RESOURCES,	)	
Respondent-Appellant.	)	
	)	
	)	
	)	
IN THE MATTER OF LICENSED WATER	)	
RIGHT NO. 3-7018 IN THE NAME OF IDAHO	)	
POWER COMPANY	)	

TO: THE ABOVE NAME APPELLANT, IDAHO DEPARTMENT OF WATER  
RESOURCES, AND ITS ATTORNEYS OF RECORD

**IDAHO POWER'S REQUEST FOR ADDITIONAL TRANSCRIPT AND DOCUMENTS  
IN THE RECORD —1**

000272

Phillip Rassier  
Garrick Baxter  
Deputy Attorneys General  
PO Box 83720  
Boise, ID 83720

AND TO: THE REPORTER OF THE ABOVE TITLED COURT;

AND TO: THE CLERK OF THE ABOVE TITLED COURT.

NOTICE IS HEREBY GIVEN, that the Respondent in the above entitled proceeding, IDAHO POWER COMPANY, hereby requests pursuant to Idaho Appellate Rules, Rule 19, the inclusion of the following material in the clerk's record in addition to that required to be included by the Idaho Appellate Rules and the Notice of Appeal. Any additional transcript is to be provided in [ ] hard copy [ X ] electronic format [ ] both.:

1. Reporter's Transcript: The entire reporter's standard transcript as defined in I.A.R., Rule 25(a) of the hearing in the above entitled case, which was heard before the court on December 01, 2009.

2. Clerk's Record:

- A. Idaho Power's Brief In Support of Petition for Judicial Review of Order Designating License No. 03-7018 A Final Order (filed July 07, 2009);
- B. Respondent's Brief (filed 8/11/2009);
- C. Idaho Power's Reply Brief (filed Sept. 08, 2009);
- D. Affidavit of John K. Simpson in Support of Reply Brief (filed Sept. 08, 2009).

3. Exhibits:

Any Exhibits associated or attached to the aforementioned documents, such as Exhibits 1, 2, and 3 attached to Affidavit of John K. Simpson in Support of Reply Brief.

**IDAHO POWER'S REQUEST FOR ADDITIONAL TRANSCRIPT AND DOCUMENTS  
IN THE RECORD — 2**

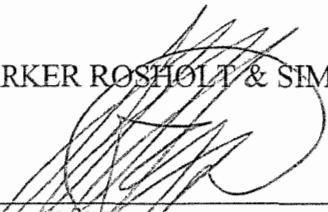
**000273**

4. I hereby certify:

- a. That a copy of this request was served upon the reporter, the clerk of the court, and upon all parties required to be served pursuant to Rule 20 (and upon the attorney general of Idaho pursuant to Section 67-1401(1), Idaho Code.);
- b. That any and all fees have not been paid, including the estimated transcript fee, as the Respondent was notified that payment information concerning the same shall be provided after the request has been received.

Dated this 5<sup>th</sup> day of February, 2010.

BARKER ROSS HOLT & SIMPSON LLP



---

JOHN K. SIMPSON  
SCOTT A. MAGNUSON  
Attorneys for Idaho Power Company

CERTIFICATE OF SERVICE

I hereby certify that on this 5<sup>th</sup> day of February, 2010, **IDAHO POWER'S REQUEST FOR ADDITIONAL TRANSCRIPT AND DOCUMENTS IN THE RECORD** was served in the following manner:

VIA U.S. MAIL, postage prepaid, addressed as follows:

GARRICK BAXTER Idaho Department of Water Resources 322 East Front Street PO Box 83720 Boise, ID 83720	District Court Clerk Washington County 256 East Court P.O. Box 670 Weiser, ID 83672
Canyon County Courthouse Attn: Debra Kreidler 1115 Albany Street Caldwell, ID 83605	

  
\_\_\_\_\_  
SCOTT A. MAGNUSON

**IDAHO POWER'S REQUEST FOR ADDITIONAL TRANSCRIPT AND DOCUMENTS  
IN THE RECORD — 4**

**000275**

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF WASHINGTON

IN THE MATTER OF LICENSED WATER RIGHT NO. 03-0718 IN THE NAME OF IDAHO POWER COMPANY, -----	)	
IDAHO POWER COMPANY,	)	
Petitioner/Respondent,	)	Supreme Court Case No. 37348-2010
-vs-	)	Civil No. CV 2009-01883
THE IDAHO DEPARTMENT OF WATER RESOURCES,	)	
Respondent/Appellant.	)	CLERK'S CERTIFICATE TO THE RECORD AND EXHIBITS

I, Betty J. Thomas, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for Washington County, do hereby certify that the foregoing Clerk's Record in the above entitled cause was compiled and bound under my direction and contains true and correct copies of the pleadings, documents and papers designated to be included under Rule 28, I.A.R. of the Idaho Appellate Rules, the Notice of Appeal and the Amended Notice of Appeal.



I certify that there were no exhibits marked for identification or admitted into evidence during the course of this action.

I further certify that the following will be submitted as an exhibit to this Record on Appeal:

**Agency's Record on Appeal, Volume I and II**

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal this 12<sup>th</sup> day of March, 2010.

(seal)

/s/ BETTY J. THOMAS

BETTY J. THOMAS  
Clerk of the District Court

IN THE MATTER OF LICENSED WATER )  
RIGHT NO. 03-0718 IN THE NAME OF )  
IDAHO POWER COMPANY )  
----- )  
IDAHO POWER COMPANY, )  
 )  
Petitioner/Respondent, )  
 )  
-vs- )  
 )  
THE IDAHO DEPARTMENT OF )  
WATER RESOURCES, )  
 )  
Respondent/Appellant. )  
 )

Supreme Court Case No. 37348-2010

CERTIFICATE OF SERVICE  
TO COUNSEL

000278

IN WITNESS WHEREOF, I have hereunto set my hand and affixed  
the seal of said Court this 12<sup>th</sup> day of March, 2010.

(seal)

BETTY J. THOMAS  
Clerk of the District Court

By: /s/ Jeanette Anderson  
Deputy Clerk

cc: Stephen W. Kenyon